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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

DURING THE

MARCH TERM, 1887, AND OCTOBER TERM, 1887.

W. H. HOLMES,
REPORTER.

Volume 15.

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JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

WILLIAM P. LORD, Chief Justice. Term expires July, 1888.
W. W. THAYER, Associate Justice. Term expires July, 1890.
R. S. STRAHAN, Associate Justice. Term expires July, 1892.

W. H. HOLMES, Clerk.



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MARCH TERM, 1887.



CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF
OREGON.

MARCH TERM, 1887.

[Filed March 28, 1887.]

**THE COUNTY OF DOUGLAS, RESPONDENT, v. THOMAS
CLARK ET AL., APPELLANTS.**

ROADS, PRIVATE.—A petitioner having pursued the mode pointed out by the Code Act of 1876 (Sess. Laws), becomes entitled to the road as a matter of right.

SAME.—A bond exacted by the County Court to indemnify the county against the expenses of location, and damages assessed, is void as being contrary to public policy.

SAME.—The County Court has no authority to take such a bond under section 1, Misc. Laws. That section refers only to corporate affairs.

SAME.—The power of locating a private road is entirely of a public nature.

APPEAL from Douglas County. Reversed.

W. R. Willis, for Appellants.

J. W. Hamilton, for Respondent.

THAYER, J.—The appellant commenced an action in said Circuit Court, upon a bond executed by the appellant to the county of Douglas, in the penal sum of two hundred dollars. The condition in the said bond is as follows:—

“Whereas, the above-named Thomas Clark has made applica-

Opinion of the Court—Thayer, J.

tion to the above-named court for a private road from his premises in section two (2) township twenty-three (23) south, range four (4) west, in Douglas County, Oregon, over and across the land of David Huff, in said section, township, and range, and county and State, said private road to be thirty feet wide. Now, if the said Thomas Clark shall pay all cost and damage that may be awarded against him upon the hearing, granting, or refusal of said petition, or opening of said private road as prayed for in said petition, or otherwise, then this obligation to be null and void, else to remain in full force and effect."

It appears from the complaint that after the said petition for the road was presented, viewers were appointed by the County Court for said county to view out and locate it, and to assess damages to be sustained thereby; and that before proceeding further in the matter, the County Court exacted from the petitioner the bond which he, as principal, and the two other appellants as sureties, executed. The complaint also contains an allegation that the bond was taken to indemnify the county against the payment of costs and damages which might be awarded against it by reason of the location of the road, and to provide against the costs and damages that might be assessed against it on appeal, from the assessment of damages given by the viewers to the Circuit Court; and it contains a further allegation that such appeal was taken; and that it was adjudged by the Circuit Court that the appellant, said David Huff, recover judgment against the county for damages sustained by him by reason of the location of the road through his premises, in the sum of three hundred dollars, with costs of proceeding, which judgment and costs the county had paid; that the county had demanded this money from the appellants, but that they had not paid it. The prayer of the complaint is for the recovery of this amount. The appellants filed a demurrer to the complaint, upon the ground that the facts stated therein did not constitute a cause of action. The Circuit Court overruled the demurrer, and the appellants refusing to answer over, judgment was entered against them in accordance with the prayer of the complaint, from which judgment this appeal is taken.

Opinion of the Court—Thayer, J.

The main question in the case is whether the County Court has authority to exact from the petitioner for the road such a bond as the one in suit, and to enforce its penalty for a violation of its conditions. The proceeding was taken under the Act of 1876. (Session Laws, 1876, p. 25.) Section 1 of said act provides: "That whenever it shall appear to the County Court by the sworn petition of any person that the residence of such person is not reached by any convenient public road heretofore provided for by law, and that it is necessary that the public and such person shall have ingress and egress from the residence of such person, the County Court shall, thereupon, appoint three disinterested freeholders of the county as viewers, and cause an order to be issued directing them to meet at a time therein specified, and not less than ten days from the making of such order, and view out and locate a county road thirty feet in width, from the residence of such person to some other public road or navigable stream, according to the application, and to assess the damages to be sustained thereby. A copy of which order shall be served upon the persons through whose land said road shall pass, within four days after the making of such order." Section 2 of said act provides the mode of performance of the duty of the viewers. Section 3 provides in regard to the report of the viewers to the County Court, and that if the County Court is satisfied that such report is just, and after payment by the petitioner of the costs of locating such road, and the damage is assessed by the viewers, that the court shall order such report to be confirmed, and declare it to be a public road, and that the same shall be recorded as such, and that any person aggrieved by the assessment of damages may appeal within twenty days after the confirmation of such report to the Circuit Court. Section 4 provides for the prevention and punishment of persons obstructing the road. Section 5 provides that such public roads shall be called "roads of public easement," and shall be opened and kept public by the person applying for the same. These various provisions include the substance of said act, and are easily construed. They confer no power whatever upon the County Court in regard to the exaction or enforcement of any bond, nor can it be implied from any express

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authority given. The mode of procedure is explicitly pointed out therein. The County Court, whenever a sworn petition of a person is presented to it showing the necessary facts, must appoint the viewers, and upon their report being made to it shall, if it is satisfied that the report is just, and after payment of the cost of location and damage assessed, order it confirmed, and declare the route viewed out and located to be a public road, and that it be recorded as such. The County Court cannot properly say to the petitioner that it will confirm the report and establish the road upon his executing a bond. Such roads can only be established when it is necessary that the public and the applicant have ingress and egress from the residence of the applicant, and after he has paid the costs of locating it and the damages assessed by the viewers, and then it becomes a matter of right. To demand a bond in such case would be contrary to public policy. It would be liable to influence the court to overlook the public necessity which authorizes the locating of such roads.

The counsel for the appellant has expressed in his brief the correct view of the question, and I can do no better than to produce his argument, and the authorities he cites to sustain it.

The County Court had no authority to require or take this bond. See Session Laws, 1876, page 25, section 1; and page 26, section 3, provides that if the County Court is *satisfied* that such report is just, and after payment by the petitioners, they shall declare such road to be a public road.

Our statute has prescribed when and in what cases the County Court may require bonds of petitioners for public roads. (See Code, p. 725, § 14.)

This is not such a case; the County Court for the transaction of county business is a creature of the statute, and must look to the statute for authority to act in any case, and this statute must be respected.

A bond taken by an officer without authority to require it is void. (*Benedict v. Bray*, 2 Cal. 251-255; *Alexander v. Silbernagel*, 27 La. An. 557; *United States v. Humason*, 6 Sawy. 199; Baylies on Sureties and Guarantors, p. 60.)

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The respondent's counsel claimed that the county through their regularly authorized officers had the right, and it was their duty to demand from the petitioner for said road of public easement the payment of all costs and damages incurred in the location of said road. (Session Laws, 1876, p. 26, § 3.)

This carries necessarily by implication the right to provide for the re-imbursement of the county by a sufficient undertaking.

The power given by statute to a county to make "all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county," is sufficiently broad and comprehensive to include all contracts which have for their object the securing of the repayment of money necessarily expended at the petition and request of one most interested. (Code, p. 535, § 1.)

The bond in this case is under seal, as shown by the complaint, and imports a consideration coming within the rule adopted by this court in the case of *Paddock v. Hume*, 6 Or. 86.

When an undertaking does not contravene public policy, nor violate a statute, it is binding between the parties, and will be enforced by the courts, and cited in support of the last proposition a large number of cases. I am unable to agree with this construction of the Act of 1876, or that the power given to counties by section 1, page 535, of the General Laws of Oregon, authorizing them to make "all necessary contracts in relation to the property and concerns of the county," has any application to the laying out of public roads. The authority there referred to relates to corporate affairs, while the one sought to be exercised is entirely of a public nature; nor do I believe that the requirement of the bond in such a case would not contravene public policy. On the other hand, I believe, for the reasons before suggested, that it would. Under this view it is unnecessary to consider any of the other points in the case. The judgment should be reversed and the complaint dismissed.

Argument for Respondents.

[Filed March 28, 1887.]

LYONS AND CHAMBERLAIN, RESPONDENTS, v.
JAMES B. LEAHY, APPELLANT.

FRAUDULENT TRANSFER.—A conveyance made without any consideration, or upon some reservation for the benefit of the grantor, or to some person who has no interest in the conveyance, or upon a secret trust, may be set aside without reference to the knowledge or intent of the grantee.

SAME.—The equity of a purchaser for a valuable consideration is greater than that of a creditor.

SAME.—Notice of the fraudulent intent of the grantor must be actual; but it is a question of fact, and may be established by direct evidence, or it may be inferred from circumstances, and from proof of the vendee's knowledge of facts calculated to awaken suspicion.

SAME.—Knowledge of facts which should put a prudent man upon inquiry are sufficient to warrant an inference of actual notice.

SAME.—Where the grantor being insolvent transferred property to his business partner, by whom it was transferred to grantor's brother, defendant, without consideration in either case, and defendant negotiated a loan of six hundred dollars upon the property, which was worth two thousand five hundred dollars, and gave the six hundred dollars to the insolvent, and it was claimed it was used by him to pay some of his debts, the transfer was set aside as crediting a secret trust, and because it was fraudulent.

SAME.—The deed being fraudulent was not allowed to stand as a security for money advanced.

APPEAL from Multnomah County. Affirmed.

Facts are stated in the opinion of the court.

Woodward & Woodward, and W. M. Gregory, for Respondents.

1. A voluntary conveyance by an insolvent debtor imports fraud. (Bump on Fraudulent Conveyances, § 265.)

2. If the voluntary deed operated to hinder creditors the fraudulent intent will be conclusively presumed.

3. *Bigelow v. Stringer*, 40 Mo. 195; *Greens v. Tantum*, 19 N. J. Eq. 109.

4. The purchaser should prosecute inquiry where circumstances are suspicious. (*Bartlett v. Gibson*, 17 Fed. Rep. 297; *Atwood v. Impson*, 20 N. J. Eq. 156; *Baker v. Bliss*, 39 N. Y. 70; *Avery v. Johann*, 27 Wis. 251; *David v. Birchard*, 53 Wis. 492; *Kerr on Fraud*, 236; *Dewitt v. Van Sickle*, 29 N. J. Eq. 209.)

15	8
39	214
15	8
46	473

5. The appellant having taken the property subject to a secret trust in favor of the insolvent debtor, the conveyance to him was void. (*Lukens v. Aird*, 6 Wall. 78; *Power v. Allston*, 93 Ill. 587; *Moore v. Wood*, 100 Ill. 451.)

6. A fraudulent purchaser claiming to hold for himself absolutely will not be protected. (*Ferguson v. Hillman*, 55 Wis. 181; *Post v. Stiger*, 29 N. J. Eq. 554; *Murtha v. Ourley*, 90 N. Y. 372.)

Alex. Bernstein, for Appellant.

Fraud is never presumed.

It is not sufficient to prove fraud in the grantor, unless the grantee participated therein.

LORD, C. J. — The plaintiffs brought this suit to have certain deeds, conveying certain real property from the defendant James B. Leahy to the defendant Isaac N. Solis, and the same from the defendant Isaac N. Solis and Maria, his wife, to the defendant William J. Leahy, set aside, on the ground that the same were executed without any consideration, and for the purpose of hindering, delaying, and defrauding the plaintiffs, judgment creditors of James B. Leahy. After issue joined, the suit was referred and tried before a referee, who found on all the questions involved in favor of the plaintiffs, and reported the same to the court, all of which was subsequently confirmed by the court and a decree entered in accordance therewith. From this decree the defendant William J. Leahy appeals to this court. The contention of the appellant resolves itself into two propositions: (1) That he is a purchaser in good faith and for a valuable consideration, and that the deed executed to him ought to be allowed to stand; but (2) that if the court for any reason should not sustain this proposition, that the deed to him should be allowed to stand as security for his re-imbursement or indemnity.

Notice of fraudulent intent. Under the provisions of statute, when a conveyance is alleged to have been made with the intent to hinder, delay, and defraud creditors, the question of fraudulent intent is to be deemed a question of fact and not of law

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(§ 54); but the provisions referred to are not to be construed to affect or impair the title of a purchaser, for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. (Misc. Laws, § 55, p. 523.) It is "previous notice" of the fraudulent intent of the grantor which renders void the conveyance of the purchaser for a valuable consideration. When the conveyance is made without any consideration, or upon a secret trust, or upon some reservation for the benefit of the grantor, or to some person who has no interest whatever in the conveyance, the knowledge and intent of the grantee are not material, and the conveyance may be set aside at the instance of the creditors. But when the grantee pays a valuable consideration for the property, and without "previous notice" of the fraudulent intent of the grantor, he will be protected in the purchase. The equitable interest of the creditor in the property of the debtor the law recognizes, and declares a transfer intended to defeat their demands as fraudulent and void; but the statute protects the rights of a purchaser for a valuable consideration, and without notice of the fraudulent intent on the part of the grantor, because, as Mr. Bump says, "the equity of such purchaser is superior to that of a general creditor, for the obvious reason that the purchaser has not, like the creditor, trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property." (Bump's Fraudulent Conveyances, 228.) As to what will constitute notice seems to be of difficult definition. It is usually distinguished by the text-writers as actual or constructive notice. But the groupings under these heads have not always been satisfactory, and the adjudicated cases indicate much confusion and conflict as to what is actual notice. (Wade on Notice, p. 2; 2 Pomeroy's Equity Jurisprudence, § 596.) In New York, under a statute like our own, it is held that the notice under the provisions cited is actual notice; that such notice or knowledge may be established by direct evidence, or it may be inferred from circumstances, and established by proof of the vendee's

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knowledge of facts pointing to the fraudulent intent or calculated to awaken suspicion; but that where it appears that he was entirely innocent and free from any guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of the fraud. Rapallo, J., said: "Although the vendee, in fact, acted in good faith and did not even suspect fraud, yet, if the jury think he ought, under the circumstances, to have been suspicious and to have looked for fraud, his innocent confidence in the integrity of his vendor must be punished by the loss of his title, and he must be charged as a party to any fraud which investigation would have disclosed. . . . We think in cases like the present, where an intent to defraud creditors is alleged, the question to be submitted to the jury should be, whether the vendee did in fact know or believe that the vendor intended to defraud his creditors, and not whether he was negligent in failing to discover the fraudulent intent," etc. (*Parker v. Conner*, 93 N. Y. 124; *Stearns v. Gage*, 79 N. Y. 102.) These cases repudiate the doctrine of constructive notice as having no application in such case. In this court, the law as thus decided was applied and approved. In *Coolidge v. Hencky*, 11 Or. 327, it was held that where a valuable consideration is paid, the grantee is not affected by anything short of actual notice of the fraudulent intention of the grantor in making the conveyance, and that the doctrine of constructive notice has no application in such case. In Wisconsin, under a like statute, a different conclusion seems to have been reached, or at least, a less strict rule is held. In *Hoover v. Hump*, 65 Wis. 78, the court say: "The words 'actual notice' in section 2243 of the Revised Statutes, and 'previous notice' in section 2324 of the Revised Statutes, are equivalent expressions, and the rule stated is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man on inquiry, which if prosecuted with ordinary diligence would lead to actual notice of the right or title in conflict with that which he is about to purchase. Where the subsequent pur-

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chaser has such knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry." Here, the court holds that a knowledge of such facts as would put a prudent man on inquiry, if prosecuted, amounts to notice, and charges him, in contemplation of law, with knowledge of the fraudulent intent of his grantor. Other cases might be referred to, but these are sufficient to illustrate the divergence of judicial utterance under a like statute as to actual notice. As the fraudulent intent is a question of fact and not of law, all agree that notice of such intent may be proved by direct evidence, or inferred from facts and circumstances. When the fact of the intended fraud is shown to have been communicated orally or in writing to the party to be charged, the evidence is direct of actual notice. But experience has demonstrated that this kind of proof can seldom be expected or obtained. Hence, the circumstances of the transaction must be resorted to for ascertaining the truth, or uncovering the fraud. When the facts and circumstances in which the transaction originated are of so significant character as to point to the fraudulent intent of the grantor—in effect to impart knowledge of it to the grantee—the inference of actual notice may be quite as convincing to the mind as where the information is conveyed directly. It sometimes happens that the facts which environ a transaction, quite as satisfactorily explain or disclose its true inwardness, and impart knowledge of its object, or of the intended fraud, as any declaratory statement or other information more directly conveyed. But it is not always possible to establish a state of facts from which actual notice of the fraudulent intent may so satisfactorily or convincingly be inferred and fastened upon the grantee. The facts in evidence may be only such as are calculated to excite suspicion and put a prudent man upon inquiry, but these, admitted or uncontradicted, are sufficient to warrant the inference of actual notice, as, in that case, the facts are not susceptible of any other rational deduction. A transfer of property with knowledge of such facts, although for a valuable con-

sideration, is inconsistent with good faith and fair dealing, and, therefore, as a reasonable inference, warrants the finding of actual notice of the intended fraud.

Facts showing fraudulent intent. Now turning to the evidence, the facts in this case show that the defendant James B. Leahy is the brother of the defendant Wm. J. Leahy, and that the defendant Isaac N. Solis a short time before had been the business partner of James B. Leahy; that at the time the property was transferred to Solis, James B. was insolvent, and that the transfer was made without consideration; that the property would have brought at a forced or cash sale two thousand five hundred dollars; that Solis, after holding the property for a few days, and manifestly under the circumstances as detailed in the record, in trust for James B., and at his request, transferred the property to Wm. J. without consideration. During all this time Wm. J. knew thoroughly the financial troubles and condition of James B.—had gone over minutely his accounts, and had counseled and advised with him concerning his affairs, and at the time he took the property from Solis, at the instance of his brother, knew and understood the circumstances under which Solis took and held the property. It is explained that the property was put in the hands of Solis to raise money to pay debts; but the conduct of Solis so shortly after the transfer, his refusal to go forward, or have anything to do with it, his unwillingness to longer hold the property, and the necessity he made of putting it into other hands to retain the secret trust already created, is inconsistent with such explanation, and shows that the property was put beyond the reach of creditors to hinder and delay their demands. The same argument is made in behalf of Wm. J., with this difference: As to him, it is claimed that although he took the property with a knowledge of such facts, that it was for the purpose of, and that he, in fact, did borrow of the Loan Association, of which he became a member, to further that object, about six hundred dollars, giving his personal note for one thousand dollars, and mortgaging this property to secure it, which he represented to be worth three thousand dollars, and that he paid over to his brother the money thus obtained (six

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hundred dollars) which was applied to the payment of some particular debts. For this reason it is claimed that he is a purchaser for a valuable consideration, and that his title ought not to be affected or impaired. Why is it, if either of the Leahys wanted to pay the creditors, that the property was not put in the market when it would have brought two thousand dollars at least, instead of taking this roundabout transaction to secure six hundred dollars? And what explanation is there of this residue, conceding the facts as stated, which is still retained to the delay of creditors? And why is it that this particular debt, or debts for which there was so much anxiety to pay, and so much trouble to secure the pittance of six hundred dollars to pay with, cannot be remembered, the amount, or names, or anything about it? The facts show that when the defendant Wm. J. took title to the property from the defendant Solis, he dealt with and recognized the defendant James H. as the true owner of the property, notwithstanding the deed from Solis, and that he knew the character of the transaction and its purpose, and that he lent himself to its furtherance. It is admitted that mere inadequacy of consideration is not of itself sufficient to invalidate a sale, or the fact of relationship, without proof that the grantee had notice of the grantor's intent to defraud his creditors. But the facts themselves, taken collectively, are decisive of the intent to hinder and delay creditors, and that he had notice of it.

Deed not allowed to stand as security. As a last resort, however, it is asked that the deed be allowed to stand to re-imburse him, or as a security for his personal liability on the note to the Loan Association. The result which we have reached precludes this. A fraudulent deed cannot stand as security for money paid on it. In *Levisay v. Beard*, 22 W. Va. 585, it is held that a deed fraudulent in fact is void *in toto*, and cannot stand as security for grantees who have notice of the fraud. In *Swinford v. Rogers*, 23 Cal. 233, it is held that a conveyance of a property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration paid therefor. The fraud taints and vitiates it, and it will not be allowed to stand, even as security for advances actually made.

Argument for Respondents.

(See, also, *Goodwin v. Hammond*, 13 Cal. 170.) The case of *Crawford v. Beard*, 12 Or. 447, is not in point. There the court expressly found that the deed was not executed with the intent to hinder and delay creditors, and under the facts, the court held that it might be allowed to stand as a security for re-imbursement. The decree must be affirmed, and it is so ordered.

(Filed March 28, 1886.)

GEO. W. PHILBRICK ET AL., RESPONDENTS, v. THOMAS
J. O'CONNOR, APPELLANT.

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40	201
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47	468

FRAUDULENT TRANSFER.—*LIN PENDENS*.—KNOWLEDGE OF GRANTEE.—NOTICE.—

Notice of the fraudulent intent of the grantor may be fixed on the grantee by the circumstances of the transaction, questioning *Ooolidge v. Henesky*, 11 Or. 327.

FACTS IMPUTING FRAUD.—The grantor shot a man, and action was commenced against him for damages. Pending the action, he transferred the property to T. J. O'Conner for a consideration of one third of its actual value. The grantor boarded in the family of grantee; the shooting by grantor and the pendency of the action were widely known, and were talked of in the family of grantee, and grantee was without any means or regular employment. *Held*, that these circumstances were badges of fraud, and the deed fraudulent under sections 3059, 3060, 3061, 3062, of Hill's Code. A deed only constructively fraudulent may be allowed to stand as security for money advanced.

APPEAL from Multnomah County. Affirmed.

The facts appear in the opinion of the court.

Jos. Gaston, and *Tanner & Carey*, for Respondents.

1. *Indicia of fraud.* O'Connor was a man of no financial ability to purchase. (*Glen v. Glen*, 17 Iowa, 498; *Seymore v. Lewis*, 13 N. J. Eq. 457.)

2. The price was inadequate. (*Seymore v. Delaney*, 6 Johns. Ch. 222; *Bump's Fraudulent Conveyances*, p. 43; *Kemper v. Churchill*, 8 Wall. 362.)

3. The consideration was fictitious. (*Bank v. O'Rourke*, 40 N. J. Eq. 98.)

4. The grantor remained in possession. (*Bank v. Fink*, 7 Paige Ch. 94; *Jackson v. Mather*, 7 Cowen, 301; *Hildreth v. Sands*, 2 Johns. Ch. 35.)

Argument for Appellant.

5. The transaction was conducted out of the usual course of business, which raises a presumption of fraud. (Bump's Fraudulent Conveyances, p. 52, and notes.)

6. The omission of the grantee to produce the debtor and other important witnesses is ground for an unfavorable presumption. (Bump's Fraudulent Conveyances, 52, and cases cited; *Bowden v. Johnson*, 107 U. S. 262; *Glen v. Glen*, 17 Iowa, 498.)

7. Evidence arising from surrounding circumstances may be stronger than the testimony of any single witness. (*Clark's Ex'r v. Van Ramsdyk*, 9 Cranch, 153; *Bowden v. Johnson*, 107 U. S. 262; *Callan v. Statham*, 23 How. 477.)

8. Notice may be inferred from surrounding circumstances. Knowledge of facts sufficient to put a prudent man upon inquiry, or the means of knowing by the use of ordinary diligence, amounts to notice. (Bump's Fraudulent Conveyances, 200, and note 1; *Jackson v. Mather*, 7 Cowen, 301; *Hoosier v. Hunt*, 65 Wis. 71; 2 Pomeroy's Equity Jurisprudence, § 579; *Tantum v. Green*, 21 N. J. Eq. 364; *Sayre v. Fredricks*, 16 N. J. Eq. 205; *Hopkins v. Langton*, 30 Wis. 382; *Holliday's Case*, 27 Fed. Rep. 809; Wait's Fraudulent Conveyances, §§ 224, 373, 382; Pomeroy's Equity Jurisprudence, § 600; *Billings v. Russell*, 101 N. Y. 226; *Rogers v. Evans*, 56 Am. Dec. 537; Bump's Fraudulent Conveyances, p. 53; *Godfrey v. Germaine*, 24 Wis. 416; *Vandall v. Vandall*, 13 Iowa, 247; *Callan v. Statham*, 23 How. 477; *Purkett v. Pollack*, 17 Cal. 327-332; *Hildreth v. Sande*, 2 Johns. Ch. 35; *Glen v. Glen*, 17 Iowa, 498.)

R. & E. B. Williams, and *R. C. Dement*, for Appellant.

1st. Actual notice of the fraudulent intent of the grantor must be established. (§§ 54, 55, Gen. Laws Code, 523; *Coolidge v. Hencky*, 11 Or. 327; *Parker v. Connor*, 93 N. Y. 118; *Starin v. Kelley*, 88 N. Y. 418; *Bonser v. Miller*, 5 Or. 110, 111; *Crawford v. Beard*, 12 Or. 453, 454; 124 Mass. 120; 2 Pomeroy's Equity Jurisprudence, § 970; 50 Cal. 132, 140.)

2d. The extent of the grantor's indebtedness is immaterial. (2 Pomeroy's Equity Jurisprudence, § 972.)

3d. The burden is on those alleging fraud to prove it. (*Kruse v. Prindle*, 8 Or. 162; *Field v. Goslin*, 12 Iowa, 218; *Evans v. Rugee*, 57 Wis. 623, 625.)

4th. An honest intent is to be imputed to the transaction. (75 Ill. 143, 147; 25 Iowa, 218; 27 N. W. Rep. 779.)

5th. The intent to defraud must exist both on the part of the grantee and of the grantor. (20 Ill. 449-462; 24 N. W. Rep. 609.)

6th. The difference between the market price and the value is immaterial, unless so gross as to create the impression of bad faith. (Bump's Fraudulent Conveyances, 45; *Wadhams v. Humphrey*, 22 Ill. 661; *Rort v. Cook*, 81 Ill. 260; *Jamison v. King*, 50 Cal. 132; *Hunt v. Hoover*, 34 Iowa, 81; *Jaeger v. Kelley*, 52 N. Y. 274; *Day v. Cole*, 44 Iowa, 452.)

7th. Grantee must have actual notice; reasonable cause to know is not sufficient. (*Carrol v. Hayward*, 124 Mass. 120; *Parker v. Connor*, 93 N. Y. 118.)

8th. Intent must be shown. (2 Pomeroy's Equity Jurisprudence, §§ 970, 971; *Starin v. Kelley*, 88 N. Y. 418; *Brown v. Foree*, 7 Mon. B. 357; 46 Am. Dec. 519.)

9th. Insolvency of grantor nor mere inadequacy of price not sufficient to establish fraud. (*Kinder v. Macy*, 7 Cal. 206; 2 Pomeroy's Equity Jurisprudence, 972; *Jaeger v. Kelley*, 52 N. Y. 274.)

10th. Deed constructively fraudulent may be permitted to stand as security. (*Crawford v. Beard*, 12 Or. 447.)

STRAHAN, J.—The plaintiff recovered a judgment in the Circuit Court of Multnomah County against the defendant P. C. Smith for five thousand dollars, for the wilful and malicious shooting and wounding of the plaintiff by said Smith. At the time of the commencement of said action Smith was the owner and in the possession of the property in controversy; but before judgment he conveyed the same to the appellant. The plaintiff sued out execution on his judgment, which being returned *nulla bona*, he brings this suit to set aside the deed made by Smith to O'Connor, pending the original action, on the ground that the

same was fraudulent. O'Connor filed an answer in the court below denying the material allegations of the complaint; but upon the trial the court found against him on the question of fraud, but under the peculiar and particular facts of the case allowed the eighteen hundred dollars which he had given to Smith at the time the deed was made to be returned to him out of the first proceeds of the sale of the property, and decreed that the plaintiff be next paid the amount of his judgment from the proceeds of such sale, from which decree the defendant O'Connor has appealed to this court.

The plaintiff claims that the deed in question is void under section 51, page 523, General Laws of Oregon, which provides: "Every conveyance or assignment in writing, or otherwise, of any estate or interest in land or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, and demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with the like intent as against the persons so hindered, delayed, or defrauded, shall be void." And sections 54 and 55 on the same page are as follows:—

"Section 54. The question of fraudulent intent in all cases arising under the provisions of title 2, 3, or 4 of this chapter shall be deemed questions of fact and not of law."

"Section 55. The provisions of titles 2, 3, and 4 of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The existence of an actual fraudulent intent on the part of Smith at the time the deed in question was made, and that it was made with the intent to hinder, delay, and defraud the plaintiff, stands admitted on this record by the defendant Smith. Though personally served with the summons and complaint, he

failed to file an answer, and was defaulted. This default for the purposes of this suit admits the truth of every material allegation contained in the complaint as to the defendant Smith.

Notice of fraudulent intent. The question, therefore, which we are called upon to consider, is whether or not the defendant O'Connor had "previous notice of the fraudulent intent," mentioned in section 55, *supra*, at the time of the execution of the deed, and as to whether he made said deed fraudulently or not. On the subject of notice in such case this court said, in *Coolidge v. Heneky*, 11 Or. 327: "These cases hold that in such case constructive notice is not sufficient; that actual notice is necessary to make the grantor a party to the fraud. Actual notice need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances." I cannot give my unqualified assent to this doctrine, though it certainly has very high authority to support it; still the reason for the distinction which the court seems to have drawn between actual and constructive notice to my mind is not apparent. The statute refers to notice. The character or kind of notice is not mentioned. It would seem that the word "notice," as used in this statute, then, would include whatever the law had fixed as notice. But the consideration of this question is not necessary at this time. The evidence shows that Smith had shot and seriously wounded the plaintiff in the city of Portland, where all of the parties resided at the time; that the plaintiff had brought an action against Smith for ten thousand dollars damages; that said action was then pending; that all of the facts were given extensive publicity through the various newspapers of the city; that they were talked over in the family of Mr. John O'Connor, with whom appellant boarded, and with him; that the appellant paid eighteen hundred dollars for the property, which was worth nearly three times that sum; that the appellant was virtually without money or any regular employment, and that the money which he paid to Smith was raised on the credit of Mr. John O'Connor, appellant's father, and Mr. Malarkey. Many of these circumstances are badges of fraud, and their tendency is to fix notice on the appellant of Smith's fraudulent purpose.

Points decided.

Deed allowed to stand as security. On the contrary, there are other facts and circumstances which tend to prove that appellant was unaccustomed to the ways and methods of business, and that he may have been used unconsciously by Smith in furtherance of Smith's fraudulent designs without really participating in the fraud further than must be implied by his receiving the property of Smith at a grossly inadequate price. This, itself, was a fact which ought to have awakened inquiry in his mind. He had no right to close his eyes or ears, and fail to notice those circumstances which pointed so directly to Smith's fraudulent designs. In any event he cannot be allowed to profit by his inattention to what any prudent business man must have noticed. Under the circumstances the finding of the court below will not be disturbed, for the reason suggested in *Crawford v. Beard*, 12 Or. 447. The decree of the court below is therefore affirmed.

[Filed March 29, 1897.]

H. D. RAY ET AL., RESPONDENTS, v. ELIZABETH N.
HODGE, APPELLANT.

ESTATE OF DECEDENTS.—An action may be maintained against the estate of a deceased person, without presentation to the County Court, for allowance under the Act of 1885, section 1134, Hill's Code.

LEASE—DUTY OF LESSEE.—Hodge, deceased, bought an interest in a lease of a mine for consideration expressed as follows: "\$750 cash, \$1,250 when 250 flasks of quicksilver produced, to each of the first parties." The lease provided that a certain amount of work should be done upon the mine during a certain time. Upon the following findings of the court below, "(1) The mine could not be operated at a profit, nor would, by any reasonable outlay, have produced 250 flasks of quicksilver." "(2) Two hundred and fifty flasks could have been produced had the mine been worked according to the terms of the lease within the specified time." *Held*, (1) That it was inferable that H., in connection with the co-lessees, had undertaken to work the mine. (2) That if H. ceased work (in connection with the co-lessees) when the same, if worked in the ordinary mode, would have justified its developments, the deferred payment would have become matured. (3) That no valid judgment could be rendered against H. without a finding that H. failed to make reasonable efforts to operate the mine in view of the expense attending the same. (4) That the contract did not compel the working of the mine after it appeared that it was profitless.

Argument for Respondents.

APPEAL from the judgment of the Circuit Court for the county of Multnomah. Reversed.

The appellant demurred to the complaint upon the ground that the claim upon which the action was founded had not been presented to the County Court for allowance, after it had been disallowed by the executrix, before this action was brought.

The overruling of this demurrer was one ground insisted on by the appellant.

The other facts are stated in the opinion.

Gearin & Gilbert, for Appellant.

1. The claim should have been presented to the County Court, as required by statute of 1885, page 44, and until this has been done cannot be sued on.

2. Hodge was not bound to go on with the work after W. and N., his co-lessees, had abandoned it; nor was he bound to manufacture 250 flasks of quicksilver at a loss; that was not contemplated or provided for in the lease. (*Skidmore v. Eikenberg*, 53 Iowa, 621; *Burger v. Peterson*, 78 Ill. 633; *Lorillard v. Silver*, 36 N. Y. 578; *Pinch v. Anthony*, 10 Allen, 470; *Reed v. Gordon*, 26 Kan. 500; *Oliphant v. Woodburn C. & M. Co.* 63 Iowa, 332.)

W. R. Willis, C. Ball, and Watson, Hume & Watson, for Respondents.

1. The right to bring the action was perfect before the Act of 1885 became a law, and is not retroactive. (*Potter's Dwarria*, 163; *Wood v. Oakley*, 11 Pa. 400; *Savings Bank v. Town of Seneca Falls*, 86 N. Y. 317; *Trist v. Cabenas*, 18 Abb. Pr. 143.)

2. The act simply gives a cumulative remedy. (*Potter's Dwarria*, 156; *Crittenden v. Wilson*, 5 Cowen, 165; *Gooch v. Stephenson*, 13 Me. 371.)

3. The act is unconstitutional. (Wells on Jurisdiction of

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Courts, § 280; *Disosaway v. Bank*, 24 Barb. 63; *Andrews v. Wallace*, 29 Barb. 350; *Comp. Laws*, 1854, p. 329; *Adams v. Lewis*, 5 Sawy. 229.)

4. When appellant abandoned the mine, when, by carrying on the work in the stipulated manner 250 flasks of quicksilver could have been produced, the unpaid purchase price became due. The cost of the work is immaterial. (2 Chitty on Contracts, 1067; *Lamoreaux v. Rolfe*, 36 N. H. 33; *Miller v. Whittier*, 32 Me. 203; *Newcomb v. Brackett*, 16 Mass. 161; *Thurston v. Franklin College*, 16 Pa. St. 154.)

THAYER, J.—The respondents commenced an action in said Circuit Court to recover the sum of two thousand five hundred dollars which they alleged to be due from the appellant, as executrix of the estate of Charles Hodge, deceased, and which allegation was controverted by the appellant. The case was tried before the Circuit Court without a jury, and judgment given in favor of the respondents for said sum. The only questions in the case that need be considered are the rights and liabilities of the parties under an agreement of assignment of a half interest in a lease, made by the respondents to said Charles Hodge in his lifetime, and the sufficiency of the findings of the Circuit Court to sustain the judgment given thereon. Some other questions were raised by the appellant's counsel, but the court regards them as untenable. The agreement of assignment is as follows:—

“Mem. of agreement made between Reuben Doty and J. H. Ray of the first part, and Charles Hodge of the second part, witnesseth, that the parties of the first part, in consideration of one dollar U. S. gold coin to them paid, and for the considerations hereinafter mentioned, have agreed and do hereby agree to transfer, assign, and make over unto the party of the second part, one-half interest in a certain lease and agreement made between the Bonanza Gold and Quicksilver Mining Company and John Winterburn and Imes J. Napier, dated October 1, 1881. The consideration noted in the margin to be paid by the said second party to the said first parties.

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“Dated at Calipooia, Douglas Co., Or., this twenty-ninth day of September, 1881.

“J. H. RAY,

“REUBEN DOTY,

“CHAS. HODGE,

“By JOHN WINTERBURN.

“(Note in margin.) \$750 cash, \$1,250 when 250 flasks of quicksilver produced, to each of the first parties.”

There is no claim but that the respondents carried out their part of the agreement by causing an assignment to be made of the one-half interest in the said lease. The transfer to Hodge, however, was made upon the express condition that the engineering and management of all the operations at the mine should be and remain in the hands of the original lessees, Winterburn and Napier. The lease referred to in the agreement of assignment was a five years' lease of the mine. It required the lessees to keep two men constantly employed, and provided for the forfeiture of the lease (at the option of the company) on failure of the lessees to do so. The lessees were to pay the company as rent one tenth of the gross product of the mine; and it was further provided in the lease that whenever, in the judgment of the lessees therein named, five hundred tons of ore of a sufficient value to justify reduction should be extracted from the mine, that they should have the same reduced at the works of the New Idrian Mining Company, or immediately begin work for the construction of a furnace for that purpose. The agreement between the respondents and Hodge imposed no express obligation upon the latter to work the mine, though I think it fairly inferable therefrom that it was understood between the parties to it that he would, in connection with the said Winterburn and Napier, work it, and that the terms of the lease would be observed. Hodge agreed to make the deferred payment to the respondents when 250 flasks of quicksilver had been produced, and if he, or his representative, refused to go on with the work when there was a reasonable probability that the mine, if worked in the ordinary mode and process in which such affairs are carried on, would have produced quicksilver in such quantities as to justify its development, said pay-

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ment would have matured. It may also be inferred from the transaction that the parties understood at the time that the mine would, if worked with reasonable diligence and care, produce an amount of quicksilver that would justify the outlay. But the court is unable to agree with the respondents' counsel, that Hodge obligated himself by taking the assignment of the half interest in the lease, to extract from the mine 250 flasks of quicksilver. He did not agree to prosecute the work longer than it could successfully be operated. The tacit understanding that the mine would prove a success was a part of the implied understanding that he would work it. The undertaking was evidently an experiment. Hodge was willing to pay the respondents \$1,500 cash, and \$2,500 more when the 250 flasks of quicksilver were produced; but he did not agree expressly or by implication that he would produce that quantity of quicksilver, or prosecute the enterprise any longer than a prudent man would be justified in continuing it. If the mine proved a failure, what object would there be in keeping the two men employed upon it during the entire term of the lease? There is no covenant that he should do that; nor any obligation to do it if its development failed to meet the reasonable expectation of the parties. The stopping the work did not give the respondents any right to claim the two-thousand-five-hundred-dollar payment, unless it was an unjustifiable quitting, as viewed from a prudent business standpoint. The issue between the parties was simply this: The respondent said that the deferred payment was due, not because the required amount of quicksilver had been produced which matured it by the terms of the agreement, but for the reason that the appellant had neglected a duty which she, as executrix of Charles Hodge, owed to them in regard to the prosecution of the mining enterprise. That was the issue that the Circuit Court was called upon to determine. We have already indicated what duty Charles Hodge was under to the respondents. Their counsel claim that the appellant abandoned the work in May, 1883, and that if she had properly conducted it, she could and would have produced 250 flasks of quicksilver prior to that time. The court found against the respondents upon this allegation: Found

“that the mine could not be operated at a profit; nor could it, by any reasonable outlay of money and labor, have produced 250 flasks of quicksilver by the thirteenth day of May, 1883.” The court did, however, find “that 250 flasks of quicksilver could have been taken out of said mine within the term of said lease, had the same been worked and operated in the manner provided in said lease.” I do not see that this last finding aids the respondents’ case in the least. The appellant could only operate the mine in conjunction with Winterburn and Napier. They owned the same interest in the lease she did, and had charge of the engineering and management of the work, and she alleges in her answer that the mine could not be worked to any profit, and was abandoned after it had been proven by the lessees that the ore did not pay the cost of reducing it. No valid judgment could be rendered in the action without a finding that the appellant failed to make reasonable efforts to operate the mine, in view of the outlay attending it, and the prospects obtained in its development. To require the appellant to impoverish the estate of which she was the representative in order to extract 250 flasks of quicksilver would be absurd. There was no implied promise arising out of the transaction to that effect. The following authorities sustain this view: *Toombs v. C. Poe M. Co.* 15 Nev. 444; *Reed v. Golden*, 26 Kan. 500; *Pinch v. Antony*, 10 Allen, 470; *Skidmore v. Eikenberry*, 53 Iowa, 621; *Berger v. Paterson*, 78 Ill. 633; *Oliphant v. The Woodburn Coal & Mining Co.* 63 Iowa, 332. This last case was an action upon a written contract to pay money when the defendant should succeed in sinking a shaft on its leased lands and develop a paying vein of coal. The plaintiff relied, as in the case at bar, upon an implied obligation to sink the shaft. The court said (p. 336): “As to the implied obligation upon which the plaintiff relies, we have to say that, if there was any, we do not think that the company, if it had sufficient money, was bound to sink a shaft regardless of expense and in the absence of any prospect of coal. . . . We do not think that any such promise was raised by mere implication of law; nor do we think that there was an implied promise to use what might seem to others to be reason-

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able efforts." In *Lorillard v. Silver*, 36 N. Y. 577, in an action upon a written promise to pay the plaintiff five hundred dollars in consideration of land the defendant had purchased from him, over and above the amount he had agreed to pay him therefor, in case he realized three thousand five hundred dollars for it, or any other sum between three thousand and three thousand five hundred dollars, that he might sell it for. It was held by the court of appeals, although it appeared in evidence that the defendant purchased the land upon speculation for the purpose of selling again, that the defendant was not bound to sell the land, although he received an offer of four thousand five hundred dollars for it. Hunt, J., in delivering the opinion of the court, said (p. 580): "The exclusive right to dispose of the property was left with the defendant, and it was a necessary result that he was justified in acting with reference to his own interest in accepting or rejecting an offer for the property. I think it was in contemplation of the parties that the defendant was to act upon this principle, and that if it should result, while so acting, that a certain rate of profit should be made, then the plaintiff's right should attach to the additional five hundred dollars. His rights were subordinate to, and dependent upon the result of the defendant's disposition of the property." This authority goes further than I am inclined to hold in this case, though it is difficult to discover any material difference in principle between the two cases. To hold that there must be a finding that the appellant neglected to operate the mine, when it could have been worked consistently with her interest, before a recovery against her can be had, is within the general line of the authorities and the rules of common sense; and as there is no such finding, and the evidence contained in the bill of exceptions will not justify any such finding, the judgment appealed from must be reversed, and the case remanded to the Circuit Court, with directions to enter a judgment upon the findings in favor of the appellant.

[Filed March 29, 1887.]

STATE OF OREGON, RESPONDENT, v. WILLIAM S. JOHNS, APPELLANT.

INDICTMENT—FORM OF.—Upon a motion in arrest of judgment, an indictment charging the defendant, "that . . . and being a room in which personal property of said county and State was kept, did then and there the room aforesaid unlawfully break and enter with the intent the goods, etc., there situate, to steal," etc., sufficiently avers that there was property of the county kept in the room at the time of entry.

SAME.—The sentence is ill-arranged, but objection should have been made before trial.

APPEAL from Lane County. Affirmed.

Facts are stated in the opinion.

L. H. Montanye, for Appellant.

J. W. Hamilton, District Attorney, for Respondent.

LORD, C. J.—The defendant was indicted, tried, and convicted of the crime of burglary. A motion in arrest of judgment was filed on the grounds that the facts stated in the indictment do not constitute a crime, in this, that at the time of breaking and entering the building, it is not alleged that property was kept therein. The overruling of this motion is the only ground of alleged error. The indictment was drawn under section 549 of the Criminal Code. The specific objection is that the indictment does not show that there was any property in the room as alleged. The allegation in the indictment is, "that . . . and being a room in which personal property of said county and State was kept, did then and there the room aforesaid unlawfully, etc., break and enter with the intent the goods, moneys, and chattels there situate, feloniously and burglariously, to steal, take, and carry away," etc. The supposed uncertainty or confusion originates in the words "there situate." If the allegation had been "did" then and there, feloniously and burglariously break and enter with the intent the goods, moneys, and chattels in the said room, then and there being, feloniously and burglariously to steal," etc., the objection would be obviated. But this is the plain import of the allegation as made.

Argument for Appellant

It in effect says that the defendant did then and there, burglariously, etc., break and enter, the room aforesaid, with the intent the goods, moneys, and chattels there situate, that is, there placed or being at the time the breaking, etc., was made. The sentence is ill-arranged and is susceptible of criticism, but the objection should have been remedied before trial. It follows from the foregoing opinion that the judgment must be affirmed, and it is so ordered.

[Filed March 31, 1887.]

A. I. WEILER ET AL., RESPONDENTS, v. D. V. B.
HENARIE, APPELLANT.

CONTRACT—GUARANTEE, CONSTRUCTION OF.—A contract reading, "I hereby guarantee the sum of \$200 per month, payable in advance, for a period of twenty-five and two thirds months, aggregating \$5,133, for rent, etc., *held*, (1) To be a guaranty on the part of the signer that the lessee of the premises should pay the sum of \$200 monthly in advance. (2) The liability accrued upon the first of any month that the rent was not so paid in advance, and action could be maintained thereon. (3) That no demand of payment or notice to the principal is necessary. (4) The court will look at surrounding circumstances to ascertain the intention of the parties, and will not be controlled by the technical meaning of the word "guarantee." (5) That the contract was severable.

APPEAL from Multnomah County. Affirmed.

Gearin & Gilbert, for Appellant.

1. The contract is entire, not severable. It in effect provides that the respondents shall, at the end of the term, receive the full sum of \$5,133, and that appellant will make up any deficiency, together with damages, if any.

2. The former recovery is a bar. (*Fish v. Foley*, 6 Hill, 56; *Atwood v. Norton*, 27 Barb. 647; *Colburn v. Woodworth*, 31 Barb. 384.)

3. Respondents must show diligence to recover the debt from the principal debtor. (*Woods v. Sherman*, 71 Pa. 101; *Shepherd v. Phears*, 35 Tex. 763; *Wheeler v. Lewis*, 11 Vt. 265; *Cady v. Shelton*, 38 Barb. 103; *Brandt on Suretyship*, § 84.)

Williams, Ach & Wood, for Respondents.

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1. The contract is a guarantee on a lease for the payment of the rent monthly.

2. The guaranty follows the principal contract, and is to be interpreted by it. (*Smith v. Rogers*, 14 Ind 224; *Simmons v. Stell*, 36 N. H. 73.)

3. A lessor has election of suing for each instalment of rent as it comes due, or at the expiration of the term suing for the whole. (*Binz v. Tyler*, 79 Ill. 253; *Sutherland v. Woodruff*, 26 Hun, 411.)

THAYER, J.—The respondents commenced an action in the court below against the appellant to recover the sum of four hundred dollars, alleged to be due upon a written guaranty, executed by him to the respondents. It is stated in the complaint in substance, that on March 1, 1886, the respondents leased certain premises in Portland to Edward Martin for twenty-five and two thirds months “at two hundred and fifty dollars per month, monthly in advance”; and the appellant, in consideration of the lease, and of one dollar, guaranteed the payment of two hundred dollars per month of said rent for the whole period, and that the rent for November and December, 1886, was due and unpaid, of which the appellant had due notice, and that demand had been made on him. The appellant, after having demurred to the complaint, and the demurrer had been overruled, interposed an answer denying that the alleged guaranty was given in consideration of the lease, or for any consideration except one dollar; and set out in the answer a copy of the guaranty in full. The appellant also alleged a former recovery in favor of the respondents against the appellant, in an action brought by the former against the latter, upon the same guaranty for the payments claimed to have matured September and October, 1886, and obtained a judgment for one hundred and fifty dollars, which he claimed as a bar. The appellant alleged in the matter of defense, claimed to be a bar, that the said court adjudged that he should pay but the one hundred and fifty dollars on said guaranty for said months, for the reason that said Martin had paid rent for the first six months of said lease, amounting to one thousand four hundred

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and fifty dollars, and the court applied the excess over and above the two hundred dollars a month, amounting to two hundred and fifty dollars, upon the two months sued for in the former action, which judgment had been paid and accepted by the respondents. The guaranty set out in the answer is as follows:—

“SAN FRANCISCO, March 1, 1886.

“In consideration of one dollar, to me paid, receipt of which is hereby acknowledged, I hereby guarantee to Messrs. A. I. Weiler & Co., of Portland, Oregon, the sum of two hundred dollars per month, payable in advance, in U. S. gold coin, for a period of twenty-five and two thirds months from above date, aggregating five thousand one hundred and thirty-three dollars (\$5,133), being for rent of premises known as No. 134 First Street, Portland, Oregon, for the term beginning March 1, 1886, and ending April 20, 1888. D. V. B. HENARIE.”

It was also alleged therein that by the terms of said lease to Martin, it was provided that on non-payment of rent for five days after due, the lease should be forfeited and the lessors might repossess themselves of the premises.

The contract is severable. The respondents demurred to the answer, which demurrer the court sustained and entered the judgment appealed from. The main question in the case is the legal obligation imposed upon the appellant by the written instrument above set out. The appellant's counsel claim, (1) That it is an entire agreement, and a judgment having been obtained thereon, is a bar to any further recovery upon it; and (2) that the appellant's obligation under the agreement is collateral, and does not arise until an attempt has been made to recover the rent from Martin.

The contract. The guaranty is severable for the payment to respondents of the sum of two hundred dollars per month, payable in advance, for a period of twenty-five and two thirds months for rent of premises. It is not shown upon the face of the guaranty for whom it was intended to answer, but it is evident from the terms of it, that it is an undertaking on behalf of the lessee of the premises referred to therein, and who is shown by the averment in

the complaint to be Edward Martin. The fact that said Martin leased the premises for the term specified in the guaranty indicates very strongly that it was an undertaking on his behalf. That and surrounding circumstances would materially aid in its construction. It is conceded by the answer that Martin was to pay for the the rent of the premises two hundred and fifty dollars per month, monthly in advance. It could not reasonably be claimed that Martin was not to pay any rent until the end of his term. The words "monthly in advance" preclude any such view; and how can the guaranty receive any different construction in that particular? The words "per month payable in advance" occur in that, and it seems to me should receive the same construction in that respect as the lease. Those words, "per month payable in advance," mean something certainly, and we must conclude either that the gross sum, \$5,133, was intended by the instrument to be made payable in advance, or that \$200 each month was to be paid in advance. In the former case the contract would be entire; in the latter, severable. It is very evident to my mind that Henarie could not have been compelled, as soon as he executed the guaranty, to pay the entire sum referred to, and it is equally clear that two hundred dollars thereof could have been enforced against him at said time, and a like sum at the beginning of each month thereafter during the term of the lease, in case Martin failed to pay the monthly rent to the extent of that sum. The conditions of the guaranty, and facts and circumstances surrounding the transaction as shown by the complaint, are decisive upon that point. The objects and purposes of the instrument are obvious. Martin leased from respondents the premises, was to pay them two hundred and fifty dollars monthly in advance, and the appellant agreed that it should be done to the extent of two hundred dollars a month in advance; whenever, therefore, Martin failed to pay any month's rent the appellant became liable to the extent mentioned. Each month, as the term advanced, created an obligation upon the part of Martin to pay two hundred and fifty dollars, and upon the part of Henarie to see that it was paid to the extent of two hundred dollars. The recovery, therefore, was no bar.

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When the obligation attaches. Upon the second point as to when the appellant became liable there can be very little question. The terms of the guaranty must decide that, and if they mean anything, they mean that the respondents should be paid to the extent of two hundred dollars in advance each month; that was the appellant's promise. He agreed that the respondents should be paid that sum monthly in advance, and when they were not so paid his agreement was broken. It stands to reason that a guarantor's agreement, like that of any other party, must be construed in accordance with its terms. Where the terms are undefined, the law infers the intention of the parties; but where the terms provide that a certain thing shall be done at a specified time, and it is not done, there is no room for construction. The obligation is definite; a breach is created and liability attaches. Thus, if A guarantees the payment of B's promissory note, he undertakes that it shall be paid in accordance with its terms. And if it is not so paid he becomes at once liable upon his guaranty for the payment of the amount of it. (*Brown v. Curtiss*, 2 N. Y. 225.) In *Brandt on Suretyship and Guaranty*, section 170, the rule is correctly stated as follows: "Where the contract of guaranty absolutely and unconditionally provides that the debtor shall pay a given sum at a stated time, no demand of payment on the principal or notice of its default is necessary before suing the guarantor." This rule, I am satisfied, is supported by reason and authority. The counsel for the appellant has cited *Woods v. Sherman*, 71 Pa. St. 100, as maintaining a contrary doctrine, but upon a close examination of that case it will be found that it does not. It is true that the guaranty there sued on was absolute in terms, at least I should so regard it, and that the trial court charged the jury "that the plaintiffs (the creditors) must show that they had used all reasonable diligence to compel payment by Davis and Woods" (the debtors). The counsel for the defendant (the guarantor) insisted that the Peffs must show that they used due diligence against the principal debtor, and that it must appear that he had no property liable to be seized and sold on execution issued upon the judgment recovered against him for the

debt. Judge Sharswood, who delivered the opinion of the court, after referring to a former decision, in which the distinction between guaranty and suretyship had been pointed out, said: "If we substitute any other word in the paper in question for the word 'guarantee,' as 'promise,' 'agree,' or 'undertake,' there can be no doubt that the writing would import an absolute and direct engagement for the payment of the contract." In *Johnston v. Chapman*, 3 Pa. 18, it was held that the legal import of the term "guarantee" is the promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who in the first instance is liable; and that decision was followed in *Isett v. Hoge*, 2 Watts, 128. In *Sherman v. Roberts*, 1 Grant Cas. 261, however, the word "guarantee" was held to have been used in its proper and not in its technical sense, a sense, it may be remarked, which very few laymen know, or consider in making contracts of this kind. The leaning of this court of late years has, therefore, very properly been against construing such contracts to be general guarantees, referring to a number of cases. The learned judge then proceeded to say this: "The case here, however, was evidently tried below on the assumption that it was a contract of general guaranty and considered in that light. We are unable to perceive that any error was committed by the learned judge, of which the plaintiff has any right to complain. The creditor, in order to recover against a technical guarantor, must prove due diligence against the principal debtor, or excuse himself by showing his insolvency, so that such pursuit would be fruitless. But it is not necessary that he should prove both." It will be seen by this quotation from the opinion in *Woods v. Sherman*, that the court there did not hold any different view than we have expressed. The Pennsylvania courts, evidently, were in the habit of attaching a great deal of importance to the technical meaning of the word "guaranty," irrespective of the sense in which it was intended to be used by the parties employing the term, though more latterly they have been inclined to construe it in accordance with its popular signification. The New York courts, on the other hand, when presided over by

 Points decided.

such judges as Bronson, discarded any such narrow construction, and determined that the language used by the parties to the writing, when plain and explicit, indicated their intent, without regard to the strict legal meaning of terms employed by them, and which they probably did not understand. There is no mistaking what was intended by the appellant when he executed the instrument sued upon in this case, nor as to what the respondents understood he intended when they accepted it, and the court ought not, in deference to any technical meaning of terms employed, or otherwise, undertake to make a different contract for them than that which they intended to make for themselves. It follows that the judgment appealed from must be affirmed.

[Filed April 11, 1887.]

D. P. THOMPSON, RESPONDENT, v. JOSEPH HOLLADAY ET AL., APPELLANTS.

BEN HOLLADAY INSTITUTED A SUIT against Joseph Holladay to have certain deeds given by the former to the latter declared mortgages, which was done, and a decree rendered fixing the amount of indebtedness of the latter to the former at \$315,492.46. During the pendency of the suit, Thompson loaned Ben Holladay six thousand dollars, and took from Holladay a chattel mortgage on certain shares of stock. At the time of this transaction, Thompson was receiver in the suit of *Ben v. Jos. Holladay*, and as such receiver had the shares of stock in his own hands. Subsequent to the rendition of the final decree of the Supreme Court, and after the suit had been remanded to the Circuit Court, the parties to the suit entered into a stipulation whereby certain property was released from the lien of the decree and applied to the payment of the debts of Ben Holladay. Various deductions were made by creditors of Holladay, and this time of the redemption of said property extended from ninety days to three years. This suit was brought to foreclose the mortgage held by Thompson, and to restrain the receivers appointed in the Holladay suit, and who were still acting and in possession of various property, including the mortgaged stock, from selling said stock to satisfy any other claim against Holladay, until all other property covered by the decree had been sold. *Held*, that the parties to the suit of *Holladay v. Holladay* had the right to make any stipulation they might desire, releasing a part or the whole of the property affected by the decree. That such stipulation did not, by keeping the property in the hands of the receivers, operate to hinder or delay creditors, in violation of the statute in regard to fraudulent transfers. That the Circuit Court had the right to continue the receivers in office, and their right to the custody of the property and the policy of the act could not be inquired into in a collateral proceeding. That the court, in the case of *Holladay v. Holladay*, had

15	34
42	120
42	121

Argument for Appellants.

the right, after having found the deeds in question to be mortgages, to direct that the property be sold to satisfy the indebtedness, but could not thereby change the time or terms of redemption as established by statute. That any person having a claim against Holladay is entitled upon obtaining leave of the Circuit Court, to maintain suit against the receivers in their official capacity, in order to affect property under their control, and that the property in the hands of the receivers would not be affected by an action against Holladay alone. That Thompson could not lawfully, while acting as receiver, appointed by the court, take a mortgage from a party in the proceeding upon property in his custody as such receiver. That Thompson was entitled to a decree for the amount of his debt against Ben Holladay personally, and the receivers in their official capacity. (Lomb, C. J., specially concurring.) Thompson could not, while receiver, become a mortgagee of property in his possession as such receiver.

APPEAL from a decree of the Circuit Court for the county of Multnomah.

Jas. K. Kelley, and C. E. S. Wood, for Respondent.

1. An insolvent debtor has no right, pending a creditor's suit, to prefer one creditor by giving him a mortgage or assignment. But where the receiver is appointed simply to preserve the estate *pendente lite*, and not for an equitable distribution of the assets among the creditors, a creditor may enforce a demand by suit. (*Ellicot v. U. S. Ins. Co.* 7 Gill, 307.)

2. There was no reason why Holladay could not make the mortgage to Thompson while the latter was receiver.

3. Joseph Holladay should be required to exhaust all other assets upon which he has a lien before resorting to the 1,194 shares of stock pledged to Thompson. (1 Story on Equity Jurisprudence, §§ 1226-1414.)

4. The Circuit Court had no authority to remove Thompson or appoint Holladay and Weidler receivers. Such proceedings were *coram non judice* and void, because no decree was entered by the Circuit Court as ordered by the mandate of the Supreme Court, and as required by subd. 2, of section 536 of the Code. It was the duty of the Circuit Court simply to enforce the decree of the Supreme Court. (Code, § 536.)

Dolph, Bellinger, Mallory & Simon, H. Y. Thompson, and Strong & Strong, for Appellants.

1. The title of the stock in question was in the receiver, not

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in Holladay. (*Barry v. Briggs*, 22 Mich. 200; High on Receivers, § 447, and note 2.)

2. A receiver is not allowed to purchase property connected with the receivership. (High on Receivers, §§ 193, 194, n. 1; *Sheldon v. Rice*, 30 Mich. 300; *C. C. Co. v. Sherman*, 30 Barb. 565; 1 Perry on Trusts, 205.)

3. The rendition of a final decree does not necessarily terminate the functions of the receiver. (High on Receivers, §§ 833, 834; 1 Barb. Ch. 346.)

4. The validity of a receiver's appointment cannot be assailed collaterally. (High on Receivers, § 470; *Whittles v. France*, 74 N. Y. 456; *Russel v. A. E. Ry. Co.* 3 Macn. & G. 115.)

5. The appointment was valid and regular. (33 Barb. 327; *Powell v. Waldron*, 89 N. Y. 328; High on Receivers, § 470; *Oakley v. Becker*, 5 Cowan, 454; *Hooper v. Winston*, 23 Ill. 353.)

6. A party to a suit may be a receiver. (2 Daniel's Chancery Practice, 1424-1429, n.)

7. The property being in the hands of the receiver appointed by the State court, in a cause where it had jurisdiction, the only proper course for respondent was to represent his claim to that court. The inference of another court in another proceeding is vain and nugatory. (*Wiswall v. Sampson*, 14 How. 67.)

THAYER, J. — The respondent commenced a suit in said Circuit Court against a number of defendants, including the appellants herein, to recover a decree against the defendant Ben Holladay, on account of moneys advanced by the former to the latter, and interest on the same at the rate of ten per cent per annum, from the time the advances were made, and to foreclose a chattel mortgage upon 1,194 shares of stock of the Portland Street Railway Company given by the said Ben Holladay to the respondent, to secure the said advances, said stock then being held and in the possession of the respondent as receiver in the suit of *Ben Holladay v. Joseph Holladay*; also to restrain the appellant Joseph Holladay from selling said shares of stock under a decree of this court, directing the sale of certain property, including said shares

of stock, until he should have first sold all the other property referred to in the said decree, or a sufficient portion thereof to satisfy the sum of \$315,492.46, decreed to be due from said Ben Holladay to said Joseph Holladay.

Answers to the complaint in the suit were filed by the appellants, and a reply to the new matter therein contained was filed by the respondent. Subsequently thereto, the respondent filed a supplemental complaint. The alleged mortgage bears date November 11, 1884. It recites the execution by the said Ben Holladay of a promissory note for the sum of four thousand five hundred dollars, bearing even date with the mortgage, payable to the order of the respondent, on or before the first day of January, 1886, with interest thereon at the rate of ten per cent per annum until paid, containing an agreement to repay all further advances that may be made by the respondent to said Holladay, but which were not to exceed five hundred dollars per month, from and after the first day of January, 1885, to be repaid at the time the principal sum became due, with a like rate of interest, and containing also a provision that the same should become due and payable upon the decision being made of the said suit of *Ben Holladay v. Joseph Holladay*, the suit in which the decree was given, if said decision should be rendered before January, 1886. Said mortgage contained a granting clause, granting the said property for the purpose of securing the payment of the said note, and advances that might be further made by the respondent, with the interest accruing thereon. The note referred to in the mortgage is also set out in the complaint; and it is further alleged in the complaint, that in pursuance of its terms said respondent, after the execution thereof, loaned and advanced to the said Ben Holladay each month inclusive, from December, 1884, to October, 1885, excepting September, the sum of five hundred dollars; and one thousand dollars in the month of November of the latter year, making six thousand dollars; and that the amount thereof, with the principal sum mentioned in said note, aggregating ten thousand five hundred dollars, with accrued interest, was due and no part had been paid. It is also alleged in the complaint that the said decree of this court, in the

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case of *Ben Holladay v. Joseph Holladay*, was given on appeal from a decree of said Circuit Court; that it was entered on the twenty-ninth day of June, 1886, and adjudged and decreed that the said Ben Holladay was indebted to the said Joseph Holladay in the sum of \$315,492.46, and that certain conveyances, assignments, and transfers of real and personal property, made by and under the direction of said Ben Holladay to the said Joseph Holladay, were decreed to be mortgages upon said property to secure the payment of said indebtedness; that the said Ben Holladay had an equity of redemption in all of said property, and that if he failed to pay the said sum of \$315,492.46, together with interest, costs, and disbursements, then and in that case, the receivers appointed in said suit should, as directed by the attorneys of said Joseph Holladay, sell the same to satisfy the said debt, and the balance, if any, pay over to the said Ben Holladay; that the mortgaged property referred to in said decree was more than necessary to pay the indebtedness, and that the lien thereof was prior to the respondent's mortgage; that the respondent had no other lien or security for the payment of said ten thousand five hundred dollars, and upon which facts the relief that the said Joseph Holladay first exhaust the other property to obtain satisfaction of his indebtedness, before selling said shares of stock, is claimed.

It is also alleged in the complaint that since said decree was rendered by this court in the suit of *Ben Holladay v. Joseph Holladay*, George W. Weidler and said Joseph Holladay were appointed receivers therein, and have the possession and control of the said mortgaged property, and were, by order of the judge of said Circuit Court, directed to be made parties to this suit. There were two several answers to the original complaint filed by the appellants; one on behalf of Joseph Holladay and George W. Weidler, in their character as receivers, and the other on behalf of Dolph, Bellinger, Mallory & Simon, and Williams, Durham & Thompson, who obtained leave of the court to intervene in the suit. The answer of Holladay and Weidler shows that on the twenty-seventh day of September, 1886, said Circuit Court made and entered an order wherein certain property,

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described in the decree in said suit of *Ben Holladay v. Joseph Holladay et al.*, was released and discharged from the lien of said decree, and was ordered to be transferred by them to George W. Weidler as trustee, as provided in the stipulation in the case theretofore filed; that on the said twenty-seventh day of September, 1886, it was so transferred, and said receivers had no custody or control of it as such receivers. The property so released is the stock in the Oregon Real Estate Company, the stock in the Willamette Real Estate Company, divers tracts of land, town property, and a balance due from Halsey stock in the Willamette Real Estate Company of \$1,328. Said answer contains an averment that the amount then due Joseph Holladay, and secured by the lien of said decree upon the property therein described, excepting that which had been so released, was \$346,686.46, with interest thereon from the tenth day of July, 1886; and that in case it should become necessary to sell said property to satisfy said decree, the stock in the Oregon Real Estate Company and in the Willamette Real Estate Company could not be sold by the receivers and the court; and that it is neither practicable nor just to order the sale of said 1,194 shares of the stock of the Portland Street Railway Company to be made after the sale of the other stock mentioned. As a further defense to the suit herein, said Holladay and Weidler alleged, as new matter, that on the eleventh day of November, 1884, at the time of the alleged execution of the note and mortgage referred to in the complaint, the respondent was the only appointed, qualified, and acting receiver of the said Circuit Court in said suit of *Ben Holladay v. Joseph Holladay et al.*, then regularly pending in said court, and as such receiver, then had the custody, control, and possession of said 1,194 shares of the capital stock of the Portland Street Railway Company; and it had been assigned to him and was held in his name as such receiver, and not otherwise; and they averred that he could not in law or equity acquire the interest in said stock claimed in said complaint.

The answer of the other appellants, Bellinger, Dolph, and others, shows that they are and were attorneys at law; were employed as such by the said Ben Holladay to attend to his law

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business long prior to the date of said note and mortgage; that they consisted of two separate firms, said Dolph, Bellinger, Mal-lory, & Simon composing one, and at the time of the employ-ment and transaction of the business as such attorneys, the said Williams, Durham & Thompson composing the other; that the said Ben Holladay, on the fifteenth day of October, 1883, engaged said firms, and that on the thirteenth day of January, 1885, he agreed with them that, to secure their compensation for said services under said contract of employment, he, said Holladay, would, from time to time, as said services should be performed, transfer, convey, and assign to the said law firms, or to some member thereof for the benefit of all, such property, real and personal, as might be agreed upon, which said property when so conveyed should be held as security for the compensa-tion for such services and advances by said firms to said Holla-day; that in pursuance of said understanding and agreement, said Ben Holladay did, on the eighteenth day of April, 1885, assign and transfer to said George H. Williams, George H. Durham, and H. Y. Thompson, 550 shares of the capital stock of the Oregon Transfer Company, and 1,200 shares of the capital stock of the Portland Street Railway Company; that in pursuance of said understanding and agreement, said Ben Holladay did, on the twenty-ninth day of August, 1885, assign and transfer to the appellant C. B. Bellinger, 5,331 shares of the capital stock of the Willamette Real Estate Company, 10,000 shares of the capital stock of the Oregon Real Estate Company, 675 shares of the capital stock of the Willamette Steam Mills Lumbering and Manufacturing Company, and 550 shares of the stock of the Oregon Transfer Company; that in pursuance of the said under-standing and agreement, said Ben Holladay did, during the month of October, 1885, and prior to the commencement of any of the actions in this State, mentioned in the complaint, in which complainants obtained their judgments, duly convey to the said Bellinger and Thompson all the real estate described in com-plainant's bill of complaint; that on the second day of Decem-ber, 1885, the said law firms had a settlement and agreement with said Ben Holladay, in which it was mutually agreed that

there was due and owing to the said firms, on account of said services and advances by them, the sum of one hundred and fifty thousand dollars, which sum said Ben Holladay then agreed to pay, together with the further sum of ten thousand dollars, due to said Dolph firm upon other accounts; and it was then further agreed between said firms and said Ben Holladay, that the said conveyances, transfers, and assignments should operate as, and be held to secure the payment of the said sums so ascertained and agreed to be due them from the said Ben Holladay, from which facts they claimed a lien upon said property prior to the lien of the respondent.

It is alleged in said answer that long prior to the dates and times mentioned in the complaint herein, the said Ben Holladay was largely indebted to August Belmont, of New York, the Mutual Life Insurance Company of New York, and S. M. L. Barlow, of the same place; that on the tenth day of July, 1886, the amount so due to said Belmont was about one hundred and fifty-four thousand dollars, the amount so due said insurance company was about one hundred and twenty-four thousand dollars, and the amount so due S. M. L. Barlow was about five thousand two hundred dollars; that said Belmont and Barlow had duly recovered judgments upon their demands in said Circuit Court, and said insurance company had an action pending upon its said demand in the Circuit Court of the United States for the district of Oregon; that said judgments and suit were being prosecuted with the view of causing it to be judicially decreed that said several demands constituted a lien upon said property prior to that of said Joseph Holladay. It is further alleged therein, after a statement of the result of the suit in this court, wherein Ben Holladay was respondent and said Joseph Holladay was appellant, that on the said tenth day of July, 1886, within said ninety days, referring to the ninety days mentioned in the decree in said suit in which Ben Holladay was allowed to redeem said property, said Ben Holladay and Joseph Holladay entered into an agreement, whereby it was provided that Joseph Holladay would forbear to foreclose his said lien until the expiration of three years from the date thereof; that as

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one of the considerations for such forbearance, it was provided that said Ben Holladay should adjust the demands of said insurance company, and said Belmont and Barlow, and of the said law firms, so that there should be no claim of priority on account of either of said demands over the lien and claim of said Joseph Holladay; and to enable said Ben Holladay to carry said agreement into effect on his part, it was provided that upon the assent of the said creditors to said agreement, the following portions of said property should be released from the lien of the said mortgage and decree of said Joseph Holladay: all of the stock of the Oregon Real Estate Company, the stock of the Willamette Real Estate Company, thirty-one acres of land at the car shops in East Portland, six lots in the town of Cornelius, in Washington County, Oregon, three blocks in the town of McMinnville, Oregon, one hundred and eighty-five acres of land in Thurston County, Washington Territory, and the St. Joseph Hotel property in the said town of Cornelius; and that the same should be conveyed to George W. Weidler in trust for the payment of the said debts and demands of the said Belmont, Barlow, the Mutual Life Insurance Company, and the said two law firms; and it was further provided that the said creditors should have a lien upon all the balance of said property, second to that of said Joseph Holladay, and that the said agreement should have the effect of a stipulation for an order from the court directing the release and transfer mentioned. It is further alleged in the said answer that within said ninety days, and on the thirtieth day of August, 1886, the said creditors duly assented to the said conditions of the said agreement, and subordinated their several claims and demands to that of the said Joseph Holladay as provided in the said agreement, and joined in and became parties thereto. It further appears from said answer that said agreement was carried out, and that, in consideration thereof, the said insurance company, Belmont, Barlow, and the two law firms entered into an agreement with the said Ben Holladay, whereby it was agreed that he would pay, and that they would accept, in full satisfaction of their said several debts and claims, the following sums respectively:—

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Belmont.....	\$41,000
The Insurance Company.....	30,000
Barlow.....	5,200
Williams, Durham & Thompson.....	37,500
Dolph, Bellinger, Mallory & Simon.....	47,500

Which sums should be payable in three years from said date, with interest at the rate of six per cent per annum; that thereupon said Ben Holladay, and Esther, his wife, in accordance with the terms of said agreement of July 10, 1886, executed to said Weidler their deed of trust conveying said property to him; that he accepted the trust imposed and entered upon his duties; that said agreement and stipulations relating to the affair, entered into between said parties, were duly filed in said suit of *Ben Holladay v. Joseph Holladay et al.*, and thereupon, on the twenty-seventh day of September, 1886, an order was made by said Circuit Court directing that the said property, which had been agreed to be transferred in trust, as before mentioned, be released from the custody of the receivers theretofore appointed in said suit, and be transferred and assigned to the said Weidler, in trust, for the purpose of carrying out the said agreement and paying the said debts and demands; and that in pursuance of said order, the said receivers did, on the ——— day of ———, 1886, transfer, assign, and set over to the said Weidler the said shares of stock of the Oregon Real Estate Company for the purposes before mentioned. And it is alleged in the said answer that the respondent had due notice, on the eighteenth day of April, 1885, of the said assignment and transfer to said Williams, Durham & Thompson, and that all the advances made by him to said Ben Holladay after that date were made with notice thereof; and that on the first day of September, 1885, the respondent had notice of the said assignment to said Bellinger, and that all the advances so made by him after that date were made with full notice thereof. The respondent in his reply to the said answer denied any knowledge or information sufficient to form a belief as to the transfers to said Bellinger and Thompson of the real estate, or of the settlement or agreement with said Ben Holladay alleged in the answer of Dolph and others, or of the

agreement to pay the said ten thousand dollars, or as to whether said conveyances, transfers, and assignment should operate as, or be held to secure the payment of the said sums alleged to have been ascertained or agreed to be due to them from said Ben Holladay; denied the notice alleged in said answer, or that the said advances made by respondent to said Ben Holladay were made with notice or knowledge on his part of the alleged assignments and transfers.

In the supplemental complaint, the respondent alleged that prior to the determination of the suit of *Ben Holladay v. Joseph Holladay et al.*, in said Circuit Court, and on the fourteenth day of May, 1884, he was appointed receiver therein; that he was such receiver on the twenty-ninth day of June, 1886, when said suit was finally determined in this court, as before alleged; that instead of complying with the terms of the decree and mandate of this court, said Ben Holladay and Joseph Holladay colluded together to have the respondent removed from the receivership, and to have Joseph Holladay and George W. Weidler appointed receivers therein in his stead, for the purpose of hindering, etc., respondent and other creditors of Ben Holladay in the collection of their debts; and that the agreement of July 10, 1886, between Ben and Joseph Holladay, set out in the Dolph-Bellinger answer, was made in furtherance of that object. A copy of the said agreement marked "A" is attached to said supplemental complaint and referred to therein. The respondent claims that the appointment of said Joseph Holladay and George W. Weidler was without any authority of law, and as additional relief, demands that their appointment be declared null and void. The defendants in the suit filed an answer to the supplemental complaint, but the facts are sufficiently indicated in the pleadings already referred to, and the exhibits filed therewith, for the purpose of considering the merits of the case. It appears that after the issues were made up the parties stipulated as follows:—

1st. Exhibits "A" and "B" hereto attached are true and correct copies of the original papers of which they purport to be copies, bearing correct dates and genuine signatures of the parties purporting to have executed them, and correct dates and genuine

signatures to the acceptances of service and proofs of service indorsed thereupon.

2d. That the papers attached to the complaint and answers in this suit are correct and true copies of the originals of which they purport to be copies, and that said original papers were duly and properly executed by the parties purporting in said copies to have executed them, and each of them, and that the purported dates thereof are the correct and true dates of the execution of said papers respectively.

3d. That exhibit "C," hereto annexed, is a true and correct copy in all respects of the original mortgage upon which this suit is brought.

4th. That said Ben Holladay did receive from said plaintiff the several sums of money at the dates, and to the amount set forth in the complaint.

5th. That the reasons stated on page 3 of the supplemental answer for increasing the amount of said decree of the Supreme Court are correct statements of the facts relating thereto.

6th. That Ben Holladay was without means to redeem the said property as provided in the decree of the Supreme Court, and that the allegations of the supplemental answer on pages 3, 4, 5, 6, and 7 are true and correctly stated.

And before the decree of said Supreme Court, a decree had been rendered in the Circuit Court of the United States for the district of Oregon in favor of George C. Hickox, and against said Ben Holladay, decreeing that the said conveyances of Ben to Joseph Holladay were fraudulent and void as to said Hickox, a creditor of Ben Holladay, which said decree was for the sum of \$38,975.86.

7th. That no order discharging said receivers has been made, and they are now in the possession of said property, exercising the duties of receivers, by virtue of and in compliance with the said order of their appointment.

8th. That after the decree of the said Supreme Court, the mandate of said court containing said decree was presented to the Circuit Court, and an order made directing the entry thereof in the journals of said court, and the same was entered and docketed, but no further decree was entered.

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9th. That this court, and if this case shall be appealed, then the Supreme Court, may refer to its record of said decree for the purpose of ascertaining its provisions, for the purpose of trying this suit.

The case was submitted to the said Circuit Court upon these various facts, and upon which said court granted the respondent the relief claimed in his complaint, from which determination this appeal to this court was taken. From the facts agreed upon in the said stipulation, and the matters referred to therein, the following may be deduced as a fair outline of the facts of the case: Ben Holladay being indebted to Joseph Holladay in a sum of money, conveyed, and caused to be conveyed to him, all his property interests in Oregon by deeds of conveyance, absolute in terms. Ben Holladay subsequently claimed that such conveyances were made for the purposes of securing the indebtedness, while Joseph assumed the attitude of an absolute purchaser of the property. The former commenced a suit in said Circuit Court against the latter to have the transaction declared a mortgage, and to ascertain the amount of the indebtedness, and applied for and procured the appointment by said Circuit Court of a receiver in the suit. After the appointment of one receiver and his resignation of the trust, the respondent was appointed receiver therein, and was such receiver when he advanced the money to said Ben Holladay, took from him the mortgage in question, and made the further advances referred to in the complaint herein; that the said Circuit Court having decreed that said conveyances were mortgages, and that the indebtedness they were given to secure amounted to a certain sum, Joseph Holladay took an appeal from the decree to this court, where the suit was tried anew, and the same conclusion reached as to the transaction being a mortgage; but a larger amount of indebtedness was found to exist in favor of the said Joseph Holladay, and against the said Ben Holladay, than that determined by the said Circuit Court. It was adjudged and decreed by this court, that in case Ben Holladay failed to redeem the property within ninety days, the receiver should at once pay over to Joseph Holladay all moneys in his hands as such receiver, and deliver to the sheriffs of the

respective counties in which the property was situated, all of the property to be sold by such sheriffs upon execution. This decree was remanded to the Circuit Court and entered therein, whereupon the said agreement of July 10, 1886, was entered into, which was sanctioned and carried out by the said court, so far as any action of the court was provided for therein. Exhibit "A," referred to in said stipulation, is the agreement mentioned in the Dolph-Bellinger answer, wherein Belmont, the insurance company, Barlow, and the two law firms agreed to accept the lesser sums in settlement, satisfaction, and discharge of their respective claims against the said Ben Holladay; and exhibit "B," referred to therein, is the deed of transfer from Ben Holladay and wife to Weidler of the trust property mentioned in said answer. Under these various proceedings, it is difficult to understand the legal status of the property Ben Holladay had an interest in at the time he commenced the suit against Joseph Holladay. Both parties concede that the appointment of a receiver in the outset was regular, and that it had the effect to wrest the property from the control of the parties, and place it in the custody of such receiver, and that it remained in that condition until the decree was rendered in the court, and entered upon the journals of said Circuit Court.

Legal effect of stipulation. The respondent's counsel, however, claim that when the decree was so entered, the Circuit Court had no authority except to enforce its terms and conditions, and that when the ninety days expired and no redemption of the property had been had, the receiver must turn it over to the sheriffs referred to, and his authority was then terminated. But when the mandate was sent down, and the decree entered in the Circuit Court, it became the decree of that court, which was then invested with the same authority over it as though it had been an original decree of that court. No court has a right to alter its decrees after the expiration of the term at which they are pronounced, unless consented to by both the parties in interest. A party in whose favor a decree is given may consent to its modification. He could cancel it if inclined to do so. Joseph Holladay had the same right to extend the time for

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redemption of the property he had to extend the time of payment of a promissory note owned by him. I know of no power whatever that could have prevented him from doing that, so long as it did not affect the rights of other parties. He had the right, of course, to rebate any portion of his claim, or lessen the rate of interest, or relinquish his lien upon the property, or any part of it. Upon the other hand, Ben Holladay had the same right to obtain as favorable terms in regard to the matter as he was able to. If, by conceding what Joseph Holladay claimed to have been an error against him in the computation by the court of the indebtedness, and agreeing to rectify it, he could gain an extension of the time for redemption of the property, a reduction of the rate of interest, and a release of a portion of it from the lien thereon, and thereby avoid a sacrifice of the property, what possible wrong could it be? Counsel for the respondent contend that his rights and that of other creditors are greatly impaired in consequence of the property remaining so long in the custody of the court, and suggests that it operates to delay creditors in violation of the provisions of the statutes relating to fraudulent transfers. In the first place, it does not delay creditors within the sense and meaning of that statute. They may bring and maintain suits against the receiver in his official capacity, almost as a matter of course, and obtain judgments against him binding the estate, subject to the equities of other parties interested in it. They are compelled, it is true, to obtain leave of the court, having custody of the property, to bring their suits against the receiver, but that requirement is imposed to prevent vexation and confusion; and they may maintain suits against the debtor in any forum as a matter of right; but the judgment recovered in such case will not bind the receiver, or compel him to do anything in aid of its enforcement. In the second place, the transaction was conducted mainly by attorneys of this court of established reputation and known integrity; it bears upon its face the impress of an honest, prudent, and intelligent affair, and was submitted to and received the sanction of the Circuit Court. To conclude, under such circumstances, that it was actually or constructively fraudulent would be effrontery. I am

not willing to listen to any suggestion indicating that the able and respectable counsel who managed the business might be knaves, or that the court that approved of it was possibly corrupt, unless the transaction itself bears unmistakable evidence that it was wrong, something about it tending to show that it was "conceived in sin, and brought forth in iniquity." It might have been impolitic to continue the receivership after the decree was entered in the Circuit Court, but it was just as necessary to have a receiver then as in the beginning.

The proceeding cannot be attacked collaterally. And besides, this court, in this case, has nothing to do with the policy aspect of the question; we cannot review the matter in a collateral proceeding further than to determine whether or not it was a void act. If the Circuit Court had power to continue the receiver and it did so, this court cannot interfere with the exercise of the power, except in a direct proceeding to review it.

Jurisdiction to order foreclosure. The respondent's counsel claim, also, that the part of the decree in *Ben Holladay v. Joseph Holladay*, which specified the time for the redemption of the property, and directed the sale of it in case it were not redeemed, should not have been made; that when the transaction in such a case is shown to be a mortgage, and the amount of indebtedness secured is ascertained, the parties should be left to pursue the usual remedy of foreclosure and sale provided by law, in case of liens upon real and personal property. The suggestion is a very important one, in view of the fact that we have no such rule in our practice as a strict foreclosure, and a sale does not affect the right of a subsequent encumbrancer, unless he is made a party to the foreclosure proceeding. I do not believe that the specification of a definite time in which to redeem the property affected the right to redeem thereafter. It only suspended proceedings to foreclose the lien during that period. Ben Holladay did not obtain the right to redeem from the court but from the law. The court determined merely that the conveyances of the property were intended to secure the payment of the indebtedness; that they were mortgages, consequently all the incidents of a mortgage applied to them. They simply constituted in law a

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lien or charge upon the property, and the statute points out the mode in which "a lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed." (Civ. Code, § 410.) A sale of the property in accordance with the decree of the court and the expiration of the statutory time for redemption would probably have barred the right. I think this court has power to decree a sale in such a suit, and that it would have the effect, when enforced, to cut off the right of redemption, unless made within the period, and in the manner provided in the Code. It seems to have been so held in Iowa, where a similar statute is in force. In *Herring v. Neeley*, 43 Iowa, 157, the defendants set up as new matter: "That being indebted to plaintiff, they conveyed to him certain land for security, which he obligated himself by bond to reconvey upon payment of the indebtedness secured, and prayed that a decree be entered declaring said deed to be a mortgage, and requiring plaintiff to treat it as such, and for such other and further relief as defendants might show themselves justly entitled." The District Court of the State declared that the deed and bond for the land constituted a mortgage, and foreclosed the same, ordering the land to be sold upon special execution for the amount of the judgment. The Supreme Court upon appeal affirmed the judgment. Beck, J., in delivering the opinion of the court, said: "It is first insisted that the court erred in rendering the decree foreclosing the mortgage, because no such claim of relief is made in defendants' answer. But they do claim such relief as under the rules of equity they are entitled to recover. Their prayer for relief is general. After the court had found the deed and bond operated as a mortgage, it may have found that equity required, in order to protect the rights of one or both of the parties, the mortgage to be foreclosed. One ground for such an order would be the avoidance of multiplicity of actions. Others based upon the evidence may have appeared. We cannot hold the decree to be erroneous, in the absence of some positive showing of error. . . . The pleadings, as we have seen, authorized the court to foreclose the mortgage when the deed and bond were found to constitute such a security, if

equity so required." The principle seems to be that the court, having jurisdiction of the subject-matter for one purpose, will do complete justice in the case between the parties when equity requires it. I notice, also, that the same practice has been recognized in some of the other States. (*Hoffman v. Ryan*, 21 W. Va. 415; *Loving v. Milliken*, 59 Tex. 423.) I can see no objection to such a course where the parties, as they did in *Holladay v. Holladay*, consent to it. There can be no question, it seems to me, but that the court had jurisdiction to order a sale after finding that the transaction was a mortgage. If it had jurisdiction for the one purpose it could certainly exercise it for the other. The court should no doubt have directed that an inquiry be made as to whether any other persons had liens upon the property, and if so, to order them brought in, and that the amounts of their claims be ascertained so that they could be discharged from the proceeds of the fund. The suit was in the nature of a bill to redeem, but a strict foreclosure not being allowed, a sale being required by positive law in order to bar the equity of redemption, the remedy has to be changed so as to meet the new condition of affairs. Courts of equity have always been able to adapt their remedies so as to do justice, and I have no doubt but that they still are.

Under the views indicated, it follows that the decision of this court in said case of *Holladay v. Holladay*, concluded the rights of the parties in the decree no further than the law, as declared by the court in the case, established them under the proof submitted at the hearing; that when the mandate was transmitted to the Circuit Court and entered upon the journals thereof, the parties were not deprived of the right to agree upon an alteration of the terms and conditions of the decree, nor the court of the power to conform it to such agreement, unless the vested rights of other parties in the litigation were thereby affected and impaired; that the parties to the decree were left as free to contract in regard to that matter as to any other lawful thing, subject only to the qualification mentioned; that the change of the terms and conditions of the decree, rendering it in the opinion of the Circuit Court necessary for the continuance of the receiver-

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ship, and the parties in interest having stipulated for the appointment of Joseph Holladay and George W. Weidler in the stead of the respondent, it was legal and proper for the Circuit Court to make the substitution, and the two persons so appointed have a lawful right to continue in the discharge of the duties imposed, until their appointment is revoked by the court that made it; that any person having a claim against Ben Holladay, and desiring to affect his estate thereby that is in the hands of the receivers, is entitled, upon obtaining leave of the said Circuit Court for that purpose, to commence and maintain an action or suit against the receivers in their official capacity, and enforce as ample remedy as though the estate remained in said Holladay's hands, unaffected by any such relationship, or such person may proceed against Holladay directly upon such claim without leave of any court, and affect any property belonging to him, or in which he has an interest, that is not subject to the control of said receivers. The respondent's counsel appeared upon the argument to be somewhat exercised on account of the shape in which the agreement between the parties, of July 10, 1886, and the action of the Circuit Court thereon, had placed the matter, and in consequence of the probable delay it would occasion in its adjustment. This is quite natural. Creditors, long delayed in the collection of their claims, are liable to be importunate and clamorous, and by a sort of attrition, produce zeal and earnestness upon the part of their counsel. But in order to judge fairly the policy that was adopted by the parties to that agreement, the number and magnitude of the claims against Ben Holladay, and his financial condition at the time, should be taken into consideration. The estate was large and valuable, and in the near future, by prudent management, could be made to liquidate all the claims and leave Holladay a reasonable competency, or by a reckless course, could have been sacrificed, and the creditors who were unsecured been compelled to accept a very small dividend, if able to obtain anything. The two ways were open, and it required no great sagacity or deep penetration to discover that one would lead to safe anchorage and the other to wreck and destruction. To have rushed in pell-mell, and seized and sequestered the property, would have bene-

fitted outside speculators at the expense of creditors and the debtor. The release of certain of the property from the control of the receivers, and conveying it to Weidler in trust, and charging it with the payment of the claims of Belmont and others, cannot, upon the facts as presented in the case, be deemed fraudulent. If the claims referred to had been fictitious, and the Circuit Court been induced by fraudulent suggestions to make the order releasing the property, the case would present a different phase; but there is no such element as that in the transaction, it is to all appearances an honest effort to secure valid claims as economically to the estate as possible. More than two hundred and eighty thousand dollars was remitted from them, the time of their payment was extended to three years, a low rate of interest was fixed, and the parties charged with the management of the property required to serve without compensation. It left this property thus set apart encumbered, it is true, to the extent of one hundred and sixty-one thousand two hundred dollars; but any excess over and above the amount of the encumbrance is subject to the payment of the other indebtedness, without question; and from the statements made at the hearing, I should judge that there would be quite sufficient to satisfy it. I am unable to discover anything that squints toward fraud in the affair; but upon the contrary, it bears the semblance of a prudent, fair, and honorable adjustment of the matter.

Co-ordinate jurisdiction of courts. The effect of the decree of the Circuit Court of the United States in favor of George C. Hickox may be, to charge the estate with the amount decreed to be due said Hickox; whether it does so or not depends upon whether said Circuit Court had jurisdiction of the parties and the subject-matter of the suit at the time of its rendition. It was claimed at the hearing that the suit in which the decree was obtained was not commenced until after the suit of *Ben Holladay v. Joseph Holladay* was begun and the receiver appointed, and was heard while the property which the decree purports to affect was in the hands of the receiver. If that is true, I cannot see how the decree can have any force or be rendered operative. There is no principle better established than that where prop-

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erty in litigation is taken into the custody of the court, through the intervention of a receiver, a party interested cannot go into another forum and establish any claim to it. The court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and, incidentally, to take possession and control of the subject-matter of the suit, to the exclusion of all interference from other courts of concurrent jurisdiction. The principle grows out of a spirit of comity, which has the highest aim for the public good, and without the observance of which, conflicts of a serious nature would be likely to arise. Co-ordinate authority emanating from our State and federal governments, administered by their respective tribunals, can be exercised harmoniously only by conceding to the tribunal which first obtains jurisdiction over the thing—the right to the exercise of it. The following language of Mr. Justice Matthews, in *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 305, expresses fully my view upon this point: “It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as in the case here, it concerns those of a State and of the United States, constituted by the authority of distinct governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over another, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction.” It is further illustrated in *Atteborough Bank v. North Western Manuf. and Car Co.* 28 Fed. Rep. 113.

The respondent's claim is only partially affected by the foregoing matters. His suit is regularly in court and not embarrassed in consequence of the continuance of the receivership; and if he acquired a lien upon the shares of stock as claimed, he is entitled

to the relief demanded. Two grounds of objection to his right to such lien are interposed. The one is that he could not legally, while receiver of the property, become a mortgagee thereof; and the other, that the right of the two law firms attached under the assignment to them, and is superior to that of his.

A receiver cannot become a mortgagee. The main ground is the former one, and its determination depends upon whether or not the attempt to acquire the lien was compatible with the respondent's duties as receiver. The office of a receiver is to take possession of the property, and hold it subject to the order of the court appointing him. The property is in the custody of the law. The court has the management and disposal of it in accordance with the rules of law and to answer the ends of justice, and the receiver is its officer to execute its authority in the matter. The powers of a receiver are in the nature of those of a guardian of a ward's estate, and his relations are of a fiduciary character. The property is held for whoever may ultimately establish a title to it, and the receiver has no power to make any contract regarding it unless ratified by the court. It is laid down as an elementary principle in *High on Receivers*, section 193, that the courts will not permit a receiver any more than any other trustee to subject himself to the temptation arising from a conflict between the interest of the purchaser and the duty of a trustee, and the author there further says: "The rule has its foundation in grounds of public policy and in the peculiar relation sustained by a receiver to the fund or estate in his custody, which resembles in this respect that of a solicitor, trustee, or any other fiduciary relation of a like nature, where the same rule of equity prevails;" and at section 194 says: "The general rule, as above stated, denying receivers the privilege of becoming purchasers of property pertaining to their trust, is entirely independent of the question whether any fraud in fact has intervened." The principle here declared forbids a receiver from taking security upon the property intrusted to his care as decidedly as it does from becoming a purchaser of it; his interest and duty would conflict as much in the one case as in the other; he holds the property not for himself but for those who may establish a

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title to it, and if he were allowed to acquire a claim upon it in his own favor, it would be very liable to occasion a conflict of interest between himself and the parties for whom it is held. In *Johnson v. Gunter*, 6 Bush, 534, where a receiver undertook to retain funds collected by him, and offset his own individual claims against the party to whom they were directed to be paid, the court said: "The money was received by appellee under a decretal order of the court, and his possession is deemed the possession of the court; no discretion is allowed him as to any application or disposition of it, but he holds it subject to the order of the court, and to be paid to whom the court shall adjudge. If the mere agent or instrument of the court can be permitted, after receiving the funds under its order, to set up claims to them wholly foreign to the object of his appointment, the position of a receiver is perverted into that of a speculator in funds, constructively, at least, in court, and their destiny becomes as uncertain after they enter the precincts of the courts as before. The court will not thus permit itself to be made a *quasi* suitor. The same objection exists against allowing a receiver to take a mortgage upon the property to secure his private debt, and the same difficulty suggested would attend the practice. The respondent, no doubt, advanced the money in good faith, and that it should be repaid him with interest there is no question; but to hold that the mortgage, executed to himself upon the shares of stock, is operative under the circumstances would sanction a contravention of public policy, and tend to the establishment of a pernicious precedent. The respondent should not be allowed to claim such lien, nor the relief granted by the Circuit Court, though I think he is entitled to a decree against Ben Holladay and against the receivers for the amount of his debt and interest, to be enforced against the former, personally, and the latter in their official capacity, out of the property in their custody, in the order of priority of payment of such claims, with his costs and disbursements herein, the amount realized from either party to operate as a satisfaction of the debt to the extent of such amount. The decree appealed from should be modified in accordance with this view.

Argument for Appellant

LORD, C. J., specially concurring.—The suit is to foreclose a chattel mortgage on certain shares of stock. The mortgage was executed to the plaintiff while receiver, and while he, as such, held the stock for money advanced to the defendant Holladay, one of the parties, pending the litigation. It is admitted that the money was advanced as alleged, and that the defendant Holladay justly owes the same. The only question is, was the taking of the lien upon property thus in his custody as receiver in contravention of public policy? I am inclined to think it was, and that the view expressed in the opinion in this particular is correct. And, therefore, as to this matter I concur in the result. But deeming the other subjects discussed in the opinion as not essential to the determination of the real question in controversy, I reserve my judgment as to them.

[Filed April 11, 1887.]

STATE OF OREGON, ON INFORMATION OF T. B. KENT,
DISTRICT ATTORNEY, FIRST JUDICIAL DISTRICT, APPELLANT, v. WILLIAM M. COLVIG, RESPONDENT.

ATTORNEYS.—The term of office of a district attorney begins on the first Monday of July following his election.

SAME.—Statutes prescribing a time within which an officer must qualify are directory in their nature.

SAME.—The person elected must qualify before taking the office.

APPEAL from Jackson County. Affirmed.

T. B. Kent, H. K. Hanna, and S. B. Galey, for Appellant.

The burden is upon the plaintiff to show his right to the office. (High on Extraordinary Remedies, § 713; *People v. Clayton*, 11 Pac. Rep. 206.)

The terms of the statute all imply that it is the duty of the person elected to enter upon his office at the commencement of the term. In the construction of the statute the intention of the legislature is to be pursued if possible. (Code, § 685, p. 248;

Argument for Respondent.

Sedgwick's State and Const. Con. 233; 8 Md. 244, 246; 2 Mich. 138.)

A statute should be brought within the fundamental law, if possible, by construction. (13 Barb. 409; Sedgwick's State and Const. Con. 233, 312; Cooley's Constitutional Limitations, 72, n.)

If the event which may produce a vacancy occur before or at the commencement of the term, the former as incumbent holds the office until his successor is elected and qualified. (*People v. Tilton*, 37 Cal. 614; *State v. Horr*, 25 Ohio, 588; *Common v. Handley*, 9 Pa. 513.)

As to the meaning of the word "vacant." (*People v. Taylor*, 57 Cal. 621.)

P. P. Prim, J. R. Neil, and W. R. Andrews, for Respondent.

The notice of appeal does not specify any grounds of error with reasonable certainty, and the judgment must be affirmed. (Code, 218, § 527; *State v. McKinnon*, 8 Or. 490; *Dolph v. Nickum*, 2 Or. 202.)

There is nothing presented by appellant upon which an assignment of error can be predicted. (Code, 121, §§ 67, 76, 119; *Bowels v. Doble*, 11 Or. 479, 480.)

The complaint should show some facts constituting the forfeiture of his office. (*State ex rel. Church v. Dustin*, 5 Or 377; *The Burdette*, 9 Peters, 690; Bliss on Code Pleading, §§ 210, 212.)

There is no time fixed by our statute within which a person must qualify, except "before entering upon the duties of his office."

There is a clear distinction between an office and the term of an office and the officer. (*United States v. Hartwell*, 6 Wall. 393; *State v. Johns*, 13 Or. 380; *State v. Wave*, 10 Pa. 888, 889.)

The term of the office commences on the first Monday of July, but the time within which he must qualify is not "the first Monday," but "before entering upon such office." A statute fixing the time within which a person must qualify for an office is merely directory. (*State v. Churchill*, 41 Mo. 21; *Chicago v.*

Gage, 35 Am. Rep. 191; *Speak v. United States*, 9 Cranch, 31, 32; *State v. Eley*, 43 Ala. 568; *State v. Cooper*, 52 Miss. 615; 5 Wait's Actions and Defenses, 5, § 8; Sedgwick's State and Constitutional Law, 368; *Hill v. Baylord*, 40 Miss. 618; *McPherson v. Leonard*, 29 Md. 337; Cooley's Constitutional Limitations, 75, 78; *Pond v. Negus*, 3 Mass. 230; *Williams v. School District*, 21 Pick. 75.)

STRAHAN, J.—This is a proceeding instituted under subdivision 1 of section 354 of the Code of Civil Procedure, and is upon the information of T. B. Kent, district attorney of the First Judicial District. The amended complaint alleges in substance the following facts: That at the general election in the State of Oregon, held June 7, 1886, the defendant William M. Colvig was a candidate for election to the office of district attorney for the First Judicial District in said State; that on the second day of July, 1886, a certificate was granted by the governor of said State showing the election of said defendant to said office, and that the governor on said day, by his proclamation, announced that said defendant had been elected to said office at such election; that the defendant thereafter wholly neglected and refused to qualify for said office at the time and in the manner provided by law, but has made default therein; that by reason of the neglect and refusal of the defendant to qualify as by law required, he has lost his right thereto, and is not entitled to hold the same; that thereafter, to wit, on the ——— day of July, 1886, the said defendant unlawfully usurped and intruded himself into said office of district attorney for said district, by appointing W. R. Andrews as his deputy district attorney in an action then pending in the Justice's Court for the precinct of Medford, Jackson County, Oregon, wherein the State of Oregon was plaintiff and William Robinson was defendant, and the said William M. Colvig has ever since said last-mentioned date claimed a right to hold said office.

And T. B. Kent, district attorney as aforesaid, alleges that he, T. B. Kent, is rightfully entitled to have and hold said office of district attorney for said First Judicial District. In

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support thereof he alleges the following facts: That at a general election in the State of Oregon, held in June, 1884, he was duly elected district attorney for the First Judicial District in said State; that thereafter, and within the time required by law, he duly qualified and entered upon the duties of said office, and has ever since performed the duties pertaining thereto; that by virtue of the Constitution and laws of this State he is entitled to hold said office until his successor is duly elected and qualified.

The defendant by his answer denied each material allegation of the complaint, and by way of further and separate defense alleged the following facts:—

That at a general election held in the State of Oregon on the seventh day of June, 1886, the defendant was elected to said office of district attorney for the term commencing on the first Monday in July next following said election; that on the second day of July, 1886, the governor of the State of Oregon duly granted the defendant a certificate of his election to said office, and delivered the same to the secretary of State, to be forwarded to the defendant; that on the ninth day of July, 1886, at Jackson County, Oregon, the defendant indorsed his oath of office on said certificate of election to the effect that he would support the Constitution of the United States and of the State of Oregon, and that he would faithfully and honestly demean himself in office, which said oath of office was then and there duly taken and subscribed by the defendant; and that on the tenth day of July, 1886, and within a reasonable time after the granting of said certificate, the defendant duly filed the same with his said oath of office indorsed thereon with the secretary of State, who accepted the same, and thereupon the defendant entered upon the duties of said office, and has ever since held said office and discharged the duties thereof; that the acts of usurpation set out in the complaint were performed by the defendant in the regular discharge of the duties of said office after he had qualified therefor, and not otherwise.

There was no reply filed to the answer, but the plaintiff, without introducing any evidence upon any of the issues, moved for judgment upon the pleadings, which motion was duly argued,

and after consideration by the court, judgment was rendered in favor of the defendant, from which this appeal is taken.

By virtue of article xv. of section 1 of the Constitution of this State, all officers except members of the legislative assembly shall hold their offices until their successors are elected and qualified.

By section 2, chapter 41, page 691, General Laws, it is provided: "The term of office of a district attorney shall commence on the first Monday of July next following the election of such attorney, and before entering upon such office the person elected thereto must qualify therefor by filing with the secretary of State his certificate of election, with an oath of office indorsed thereon, and subscribed by him to the effect that he will support the Constitution of the United States, and of this State, and faithfully and honestly demean himself in office."

And it is provided by section 48, chapter 14, page 576, General Laws: "Every office shall become vacant on the occurring of either of the following events, before the expiration of the term of such office":—

"6. His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law."

There is no statute in this State prescribing the time within which the official oath of a district attorney must be taken and filed. It is true the term of office begins on the first Monday of July next following the election; but the newly elected officer is not bound to qualify on or before that day, or upon failure to do so incur a forfeiture of his office. "Before entering upon such office the person elected thereto must qualify therefor," etc., is the language of the statute, and it raises a very strong implication that some time may be allowed to elapse after the term begins before the newly elected officer need qualify. The only result that could follow a delay in qualifying is that he could not enter upon the duties of said office without first having qualified by taking the official oath and otherwise complying with section 41, *supra*. But in addition to this,

Points decided.

statutes fixing a time within which an officer is required to qualify, by taking an oath and giving a bond, are generally directory, and a failure to comply within the time fixed does not work a forfeiture. (*State ex rel. Blankenship v. County Court of Texas County*, 44 Mo. 230; *State ex rel. Att'y-Gen. v. Churchill*, 41 Mo. 42; *City of Chicago v. Gage*, 95 Ill. 593; *Speake v. United States*, 9 Cranch, 28; *State of Maryland v. Co. Commrs. of Baltimore County*, 29 Md. 516; *Williams v. Inhabitants of School District No. 1*, 21 Pick. 75; *City of Lowell v. Hadley*, 8 Met. 180; *Ex parte Heath and Roome*, 3 Hill, 42; *People ex rel. of Westcott v. Halley*, 12 Wend. 481.)

It is unnecessary to notice the other questions discussed, as these views require an affirmance of the judgment, and it is so ordered.

[Filed April 11, 1887.]

JAMES P. McBEE, RESPONDENT, v. C. CEASAR ET AL.,
APPELLANTS.

BAILEMENT—RIGHT OF DEPOSITOR.—The deposit of wheat in a warehouse, which has been mingled with the wheat of other persons in a common mass, is a bailment, and the depositor does not lose his right thereby to reclaim it.

DAMAGES FOR CONVERSION.—Where a warehouseman ships wheat to a third party, without the consent of the depositor, such depositor is not estopped from claiming damages for its conversion, unless by acquiescing in the acts of the warehouseman he has misled such third party.

APPELLATE COURT, PROVINCE OF.—It is not the business of an appellate court on a bill of exceptions to judge of the quantum of proof, or to correct errors of a jury.

BILL OF LADING.—A bill of lading is not to be regarded as a contract in writing, but as an admission on the part of the consignor as to his purpose at the time of making the shipment, and such admission is subject to be rebutted.

NOTICE, IMPLIED.—The fact that a person stores wheat in a warehouse, with knowledge that it is a custom to ship the wheat from the warehouse at a certain season of the year, is not sufficient to impute knowledge and acquiescence upon his part that his wheat would be shipped, so as to create an estoppel against him.

APPEAL from Multnomah County. Affirmed.

15	62
30	42
15	62
48	15

Argument for Respondent.

Facts are stated in the opinion of the court.

Williams, Ach & Wood, for Appellants.

1. The court erred in allowing witness, T. J. Blair, to testify that the wheat was shipped to defendants. It is a presumption of law that the ordinary course of business was followed, and the shipping receipts were the proper evidence of the shipment. (*Young v. Miles*, 20 Wis. 646; Code, 261.)

2. It was error to allow Blair to testify as to what he wrote defendants without producing the letter or accounting for its absence. (Code, § 681, p. 247; § 749, p. 258.)

3. The court erred in allowing proof of the demand which described the wheat as shipped by the City of Salem, when they had sued for wheat shipped by the steamer McCulley.

4. The court should have instructed the jury, that if plaintiff deposited the wheat in the warehouse with other wheat in an undistinguishable mass, and knew that Blair was selling and shipping wheat from this mass, and if defendants only received about six thousand three hundred bushels out of thirty-seven thousand bushels so deposited, and no part of the wheat was separated or set apart for plaintiff, he cannot recover.

J. B. Bryson, John Burnett, and Watson, Hume & Watson, for Respondent.

1. There was no evidence of any bill of lading, and in any event, it was competent to establish the fact by parol testimony that defendant got the wheat.

2. The defendants were not misled by the misdescription in the demand.

3. A deposit of wheat in a warehouse in a common bin is not a sale. The depositor has an interest in the common mass equal to the amount of his deposit, subject to a proportionate share of loss, and if all other depositors withdraw the amount of their deposits, the remainder belongs to him absolutely. The facts that other deposits have been made and withdrawn in the mean time does not affect the result. (Wells on Replevin, §§ 203,

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210; *Kimberly v. Patchon*, 19 N. Y. 337; *Sexton v. Abbott*, 53 Iowa, 181, 188, 189; *German Bank v. Meadow Craft*, 95 Ill. 124; 35 Am. Rep. 137; *Sears v. Abrams*, 10 Or. 449; *Young v. Miles*, 20 Wis. 615; 23 Wis. 644; *Chase v. Washburne*, 1 Ohio St. 244; 59 Am. Dec. 623, n.; Story on Bailments, § 40; *Clarke v. Griffith*, 24 N. Y. 595; *Forbes v. B. & L. R. R. Co.* 133 Mass. 154.)

4. Respondent was not only required to prove the amount of his own deposit, but those of his assignors. If other depositors had an interest in the mass, it was a matter of defense.

5. The instruction upon the question was correct. (Code, p. 765.)

6. The instruction given by the court as to the effect which ownership by other parties would have upon respondent's rights was correct, when taken with the general instruction that the existence of rights of other parties would not bar the action, but would cut down the amount of respondent's recovery. (Freeman on Cotenancy and Partition, 353, 356, 357; *Hill v. Gibbs*, 5 Hill, 56, n. a; *Wheelright v. De Peyster*, 1 Johns. 471, 486; 6 Johns. 108; 8 Johns. 101; *Thompson v. Haskins*, 11 Mass. 419; 1 Chitty on Pleading, 74.)

7. This being an action of trover, it is not necessary to identify the property further than to prove its general character. (*Ramsey v. Beezley*, 11 Or. 49; *Budd v. Mult. C. Ry. Co.* 12 Or. 276; *Hake v. Buell*, 50 Mich. 89.)

8. Variance between proof and pleading is immaterial, unless it has misled the opposite party to his prejudice. (Code, pp. 124, 125, §§ 94, 95; *Began v. O'Rielly*, 32 Cal. 11; *Plate v. Vogel*, 31 Cal. 383; *Dodd v. Denny*, 6 Or. 156; *Hill v. Mellon*, 3 Or. 542.)

9. A judgment will not be reversed on account of error which did not prejudice appellant. (*Stewart v. Kimball*, 43 Mich. 443; *Eberstein v. Kamp*, 37 Mich. 176; *Hollister v. Bronthal*, 19 Mich. 163; *Stansell v. Leavitt*, 51 Mich. 427, 537.)

LORD, C. J.—This is an action for the conversion of about 6,343 bushels of wheat alleged to have been deposited in the

warehouse of T. Blair, at Booneville, and subsequently, in the year 1885, shipped in the steamer McCully and delivered to the defendants. The action originated in this state of facts: During the years 1883 and 1884, the plaintiff and other persons who have assigned their claims to him, deposited their wheat in the said warehouse, taking what are known as "weighing checks," for each load as delivered, and after the deposits for the season were complete, regular warehouse receipts for the whole amount of wheat deposited were given to them. The amount so deposited is the amount above alleged. None of said wheat deposited by the plaintiff and his assignors was ever drawn out by him or them, but about the 1st of February, 1885, all the wheat remaining in the warehouse was shipped to the defendant at Portland. Besides these parties, others were depositing wheat in said warehouse, which was mingled with the wheat deposited as stated in common bins. The defendants, after denying the allegations of the complaint, affirmatively set up that from time to time they received wheat from Blair, and advanced money to him, and that at the close of the transactions, Blair owed them \$5,795.43, and that they had in their hands 6,639 bushels of wheat, upon which they claimed a lien for said advances, and also for charges and expenses. The trial resulted in a verdict for the plaintiff, and judgment having been entered in accordance therewith, the defendants appeal. All the objections reserved and assigned as error are presented in the bill of exceptions. It is first objected that it was error to allow Blair to testify that the wheat in question was consigned to the defendants. The specification of error was that the only proper proof of this fact was a bill of lading. The evidence discloses that there was no evidence of any bill of lading, or other writing showing the consignment to the defendants. The material fact for the plaintiff to establish was that the defendants received the wheat. The plaintiff had nothing to do with any agreement which might have existed between Blair and the defendants, nor was he bound to produce the evidence which may have existed between them to fix their liability to each other. As between them, a bill of lading is not to be regarded as a contract in writing, but merely as an admission on the part of the

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consignor as to his purpose at the time of making the shipment, and such admission is subject to be rebutted. The fact that the wheat was deposited with Blair is not contradicted, and he testified that it was shipped to the defendants. This was evidence tending to prove the fact in issue, and was competent for that purpose, and if the defendants had any evidence to rebut it, they could have submitted it. We do not think there was any error in the ruling excepted to, nor to the succeeding assignment of error for a like reason.

Mistake in the demand. It is next objected that there was a mistake in the written demand as to the name of the boat in which the wheat was carried. The demand was made by Mr. J. F. Watson, and the conversation which took place at that time shows that the defendants knew and understood what wheat was demanded. In a word, that there was no mistake as to the property involved in the action, and therefore the mistake alleged could not prejudice the defendants.

Bailment. The next assignment of error presents the question as to the effect of mingling wheat of several depositors in common bins of a public warehouse. It has been held by this court that such a deposit is a bailment, and that the depositor does not lose his right to reclaim the wheat so deposited from the common mass. It was admitted by the counsel for the appellant that the later authorities were to this effect, and when his attention was called to a late decision of this court, which involved the determination of a like principle, he abandoned this exception. The record, however, discloses that this assignment was the strong point on which the appellant relied to reverse the judgment, and there can be no doubt, if the position for which he contended could have been sustained, it would have been fatal to the judgment which the plaintiff obtained. But the necessity for abandoning it—the adverse decision referred to—renders some of the other assignments of error which are coupled with the theory unimportant, and we shall, therefore, only notice such of the other assignments as do not include these, and which counsel deemed material in producing an incorrect result.

Respondents not chargeable with notice of Blair's customs. It

is contended that the court below erred in instructing the jury that "there is no evidence for the jury to consider that the plaintiff or any of his assignors ever authorized Blair to deliver any of the wheat described in the complaint to the defendants." The transcript contains all the evidence; and that part of it which, it is claimed, tends to show such authority, is based on Blair's testimony that he had been accustomed to ship away the wheat remaining in the warehouse at Booneville before low water came, which, taken in connection with the fact that during that time plaintiff and his assignors had been storing wheat with him, carries the inference that such depositors did not contemplate that their wheat would lie in that warehouse all summer. In other words, it is claimed upon this state of facts that unless the plaintiff and his assignors withdrew their wheat deposited in that warehouse before low water came, they must have known it would be shipped, and consequently acquiesced in it, which was equivalent to such authorization. It is insisted, therefore, there was evidence on this point which the court erred in excluding from the consideration of the jury. The fact that the plaintiff and his assignors had been storing wheat with Blair in the Booneville warehouse, taken in connection with the fact that he had been in the habit of shipping wheat from this warehouse before low water came, does not warrant the inference that the plaintiff or his assignors knew it, much less acquiesced in or authorized its consignment and sale. There is no evidence to show that the plaintiff or his assignors knew that Blair was accustomed to ship wheat from this warehouse before low water came. The vice of the argument lies in assuming that the fact of storage of the wheat in that warehouse charges the plaintiff and the assignors with knowledge of the other fact, that it was the custom of Blair to ship the wheat from the warehouse before low water came. The two facts do not have such necessary connection with each other as to justify such inference, without the aid of further proof.

Estoppel. Nor do we think there was any error committed in the instruction of the court upon the question of estoppel. It is only such knowledge of the acts of Blair as indicated an inten-

Argument for Appellant.

tional acquiescence, and by such conduct led the defendants to believe that the shipment of the wheat was rightful; that, the court instructed the jury, operated as an estoppel. As a matter of law the instruction is correct, although the facts are extremely meager, if there are any upon which to predicate an instruction of estoppel. There was no error in the language in which it was given, and under the circumstances as disclosed by the record, it was favorable to the defendants. It was earnestly urged that the verdict in this case worked an injustice. If such was the fact, it arose out of matter which it was the province of the jury to decide, and not out of any error of law which it is the province of this court to correct. It is not the business of a court, "on a bill of exceptions, to judge of the *quantum* of the proof, or to correct the errors of the jury, and make a bad precedent because the case is a hard one." (Gibson, C. J., *Sidwell v. Evans*, 1 Pen. & W. 385.) After a careful examination of the record we are constrained to affirm the judgment, and it is so ordered.

[Filed April 13, 1887.]

**WILLIAM J. STEWART, ADMINISTRATOR, APPELLANT, v.
J. C. CORBUS AND LAURA CORBUS, RESPONDENTS.**

COSTS—UPON JUDGMENT BY STIPULATION.—Costs are an incident of the judgment, and where parties stipulate that a plaintiff may take judgment against the defendant, plaintiff will be entitled to costs.

APPEAL from Benton County. **Reversed.**

Facts are stated in the opinion.

Weatherford & Blackburn, for Appellant.

The general rule of the law is that the party in the wrong must pay the costs. (5 Wend. 507.)

Costs are a mere incident to the judgment, and it is not necessary or proper to stipulate in regard to costs. (*McDonald v.*

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Evans, 3 Or. 475; *Wing v. N. Y. & Erie R. R. Co.* 1 Hilt. 235; *Roberts v. Carland*, 1 Or. 332.)

J. R. Bryson, for Respondents.

1. The stipulation fixed the amount of the judgment, and the court has no power to vary the terms of their judgment. There is no "prevailing party" in a case where a judgment is had by stipulation.

2. The proceeding was a joint one, and the plaintiff had no right to a judgment against one of two joint defendants. The plaintiff took a judgment against defendant J. C. Corbus, and this precludes him from taking a judgment against respondents. (Code, p. 223, § 540; *Ah Lep v. Gong Choy*, 13 Or. 214.)

3. If any error was committed it was in not rendering judgment in the original action, and the appeal should be taken from that judgment.

LORD, C. J.—The only question in this case arises on a stipulation of the parties. The stipulation was as follows:—

"It is hereby agreed and stipulated that the plaintiff may take judgment against the defendant Laura Corbus, for the sum of one hundred dollars, and the clerk is hereby authorized to enter judgment for said amount, and that execution not to issue until the first day of October, 1886.

(Signed,)

"J. K. WEATHERFORD,

"Attorney for Plaintiff.

"J. R. BRYSON,

"Attorney for Defendant Laura Corbus."

Thereafter the plaintiff filed a motion for judgment for costs and disbursements of the action against the defendant Laura, which the court overruled, and the plaintiff appeals, assigning this ruling and order as error. The evident object of the stipulation was to limit the amount of the judgment to the sum named, and fix the time within which it might be paid before resort could be had to the process of the court to enforce it. There is nothing said of costs, and for this reason it is argued that costs were excluded. We think the rule is otherwise; costs are an

Points decided.

allowance to a party for the expenses incurred in prosecuting or defending a suit, and are an incident of the judgment. The stipulation provided, "that the plaintiff may take judgment," etc., and the judgment entered in pursuance of it carried the costs as an incident, unless expressly stipulated. In *Wing v. N. Y. & E. R. R. Co.* 1 Hilt. 244, it is held that when a judgment is entered for the plaintiff for an amount fixed by stipulation between the parties, the plaintiff is entitled to costs in addition thereto, although they are not mentioned in the stipulation. The court says: "Costs followed as a matter of course upon the plaintiff's recovery, and if the defendants wished to protect themselves against the payment of them they should have inserted it in the stipulation." Something was said at the argument about the apportionment of the costs between the parties; but this is a matter with which we have nothing to do on this appeal. To whatever extent the defendant in the stipulation was liable, as a consequence of the judgment in the action, the plaintiff was entitled to have taxed and recover. The judgment must be reversed.

[Filed April 14, 1887.]

STATE OF OREGON, RESPONDENT, v. NELSON DILLEY
AND HENRY JOHNS, APPELLANTS.

CRIMINAL LAW—INDICTMENT, FORM OF.—In an indictment for taking money by force from the person of another, it is not necessary under our statute to allege that the money taken was the property of another than the defendant.

EVIDENCE—PRACTICE.—Where on a trial the State proved that the tracks of a horse ridden by the defendant were similar to those of another horse owned by the defendant, upon the direct testimony, and the defendant introduced testimony showing that the horse was shod, and the State in rebuttal introduced witnesses to show that the horse was not shod; *held*, that it was error to exclude evidence offered by the defendant after the rebuttal by the State, that the horse was shod the day after the commission of the crime.

APPEAL from Marion County. **Reversed.**

Tilmon Ford, and *George H. Burnett*, for Appellants.

George W. Bell, District Attorney, for the State.

THAYER, J.—The appellants and one George Simmons were indicted jointly in the Circuit Court of Marion County for the crime of assault and robbery, being armed with a dangerous weapon. They all pleaded not guilty, and on the trial the appellants were convicted and said Simmons was acquitted. From the judgment of conviction entered thereon, this appeal was taken and brought here. The indictment reads as follows:—

“The said Nelson Dilley, George Simmons, and Henry Johns, on the twenty-first day of August, 1886, in the county of Marion, and State of Oregon, then and there being armed with a dangerous weapon, to wit, a pistol loaded with powder and ball, did then and there feloniously commit an assault upon one Ah Sing, with intent if resisted to kill or wound the said Ah Sing, and then and there feloniously took three twenty-dollar gold pieces and one ten-dollar gold piece of the current coin of the United States of America from the person of said Ah Sing, and against his will.”

The following is the section of the statute under which the indictment is drawn:—

“Section 533. If any person being armed with a dangerous weapon shall assault another with intent, if resisted, to kill or wound the person assaulted, and shall rob, steal, or take from the person assaulted, any money or other property *which may be the subject of larceny*, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than five nor more than twenty years.”

The indictment follows form No. 10 in the appendix to the Criminal Code, except where it enlarges upon that form, by naming the kind of dangerous weapon used.

On the trial to support the issues on the part of the State, the prosecution offered testimony tending to show that certain horse tracks were found in the vicinity of the scene of the alleged robbery, and were tracked in the direction of where the defendants claim to have been stopping at the time, and also tending to show that a *brown* horse, belonging to one of the defendants, made tracks similar to those found near the scene of the robbery, and

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that said horse was shod with shoes upon the fore feet, which had certain peculiarities; and further that two witnesses for the prosecution examined a certain *roan* horse belonging to said defendant, and all other horses found upon the premises where the defendants were stopping, and found *none* except the *brown* horse that made tracks similar to those found near the scene of the robbery; that said examination was made on Sunday, following the Saturday morning on which the robbery was alleged to have been committed, and that said defendants were not present, but were confined in jail at the time. After the prosecution rested, the defendants offered testimony tending to show that Simmons, one of the defendants, in the afternoon before the robbery brought said *roan* horse from near the place where the robbery was committed, over a part of the way where these tracks were found, and tending to show that the *roan* horse was at the time shod, and made tracks similar to the *brown* horse; and that said defendant Simmons had been harvesting at George B. Miller's where the robbery was committed, and that the tracks of said *roan* horse were made when said Simmons returned from said harvesting on said afternoon. After the defendants rested, the prosecution offered testimony tending to show that said Simmons had stated that said *roan* horse was not shod at the time of the robbery, and thereupon recalled the two witnesses who had examined the *roan* horse on the Sunday referred to, Miller and Croisan, who both swore that said *roan* horse was not shod at that time, and the prosecution then rested. The defendants then offered as a witness Orville Hubbard to prove that said *roan* horse was shod on said Sunday, when said horse's feet were examined, but the prosecution objected to the introduction of such evidence, claiming that the same should have been introduced by the defense on examination in chief, and the court sustained the objection, and the defendants excepted. The defendants by their attorneys still offering this testimony, offered to prove that they and their clients had only come into possession of the fact that the witness Hubbard would so testify, since the testimony on that subject was offered by the prosecution in rebuttal as aforesaid, and that the defense was taken by surprise at the said

testimony of the prosecution, but the court still sustained the objection, and the defendants duly excepted to said ruling as an abuse of the court's discretion.

The appellants' counsel have alleged a number of grounds of error in the judgment of the court below which we shall not notice, as we regard them entirely untenable. The main ones are that the indictment is defective in not alleging that the money charged to have been taken was the property of another, and that the court erred in not allowing them to call said Orville Hubbard as above mentioned.

Indictment need not allege ownership. The indictment at common law would have been defective. It would have been necessary under that system to have averred specially to whom the money belonged. The fact that it might have belonged to the robber and not to the person robbed had to be negatived. The presumption was that the person having possession of it owned it, but that did not answer the nicety of the law as it then existed; it had to be affirmatively alleged that it was the property of some one aside from the person who forcibly compelled its surrender to himself. But our statute has dispensed with the necessity of so useless a requirement. It has provided in express terms what shall be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon. (Crim. Code, § 71.) The appellants' counsel lay a good deal of stress on the qualifying clause in said section 533, Criminal Code, above set out, containing the words, "which may be the subject of larceny." That clause refers to the words preceding it, "any money or other property"; all that is necessary to determine where one person has taken from another property under the circumstances averred in the indictment herein, is whether it is such an article as might be the subject of larceny. The money of course could have been the subject of larceny, but the counsel contend that in order to have been the subject of larceny it must have been the property of another, which the indictment does not allege. The indictment, however, does allege all that the statute says need be alleged. It seems to me that the counsel have undertaken a difficult task in attempting to establish that an express provision of

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the statute is nullified by implication or inference. Conceding that, in order to constitute the offense charged, the money must have belonged to the Chinaman, or to some person other than the defendants in the prosecution, and that the clause in said section 533 required that such should have been the fact, it would not follow that the statute required such fact to be expressly alleged, especially when another provision of the same title excludes the necessity of alleging it. The statement in the indictment that the defendants took "three twenty-dollar gold pieces and one ten-dollar gold piece . . . from the person of said Ah Sing," etc., left the inference that the coin belonged to Ah Sing. The proof of the facts alleged in the indictment established, presumptively, that the defendants dispoiled Ah Sing of his money, but that would not necessarily preclude the defendants from disproving his ownership of it. They had the right under their plea of not guilty to show that the money in fact belonged to them. The change in the manner of pleading made by the statute does not deprive defendants in such cases of any substantial right; it has only relieved the necessity of inserting an unnecessary allegation in the indictment. It follows that the indictment is not defective.

Introduction of evidence. The other ground of error, however, is more difficult to surmount. The robbery was committed in an out-house on said George B. Miller's farm near Gervais. The house was occupied at the time by five Chinamen, including the said Ah Sing. Three persons were engaged in the commission of the offense, who came to the place upon horseback, and the identity of the said horse tracks with those of the brown horse was a material circumstance in the proof of guilt of the defendants. The prosecution undertook to establish such fact by the testimony of witnesses. The issue so made by the evidence involved not only that the tracks examined were similar to those made by the brown horse, but unlike those made by the roan or any of the other horses found upon the premises. Those witnesses did not state in direct terms, when first upon the stand, that the roan horse was not shod, but certainly that he was not must have been implied from what they did say. If the roan horse had no shoes on, that would have

occasioned a marked difference between the tracks of the two. At all events, the prosecution attempted to show that the tracks made by the brown horse were peculiar and different from those made by the roan, and I cannot see why that did not include proof that the roan was not shod. That evidently was one reason why their tracks were thought to be dissimilar, otherwise why should the witnesses have been recalled to prove that the roan had no shoes on. It looks to me as though that fact was a part of the prosecution's case; and that when the said witnesses were recalled by the prosecution, their testimony as to the roan horse not being shod merely went to strengthen the evidence that had already been given upon that point. It was the reason, and may have been the only reason why there was a difference between the tracks of the two horses. The prosecution should have submitted all its proofs upon that point before it rested, and it seems to me that there was no greater impropriety in the defendant's calling Orville Hubbard to show that the roan horse was shod, than there was upon the part of the prosecution in recalling Miller and Croisan, after having rested, to prove that he was not shod. According to the regular mode of conducting an examination in such cases, the party having the affirmative must introduce all the evidence to make out his side of the issue. Then the evidence of the negative side is heard, and finally the rebutting proof of the affirmative, which closes the investigation. (*Hastings v. Palmer*, 20 Wend. 225.) Our statute prescribes substantially the same course. (Civ. Code, § 194.) Ordinarily the defendants would have had no legal right to call said Hubbard after having closed their testimony; but as the prosecution had rested without having examined the two witnesses upon the point, and was allowed to recall them to make proof of the fact, after the defendant had rested, I do not see why the latter should not have been entitled to call their witness. It may be claimed that the testimony of the horse being shod introduced a new fact, and that the evidence upon the part of the prosecution was rebutting proof. I am aware that there is a class of cases which hold that matter introduced by a party having the negative of an issue may be disproved by the party having the affirmative, although the

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proof goes to sustain the plaintiff's evidence in chief; cases where a defendant has undertaken to prove an *alibi* by showing that he was at a particular place from that alleged at the time of the occurrence, and when the defendant denied the plaintiff's ownership to personal property, in a contention regarding its title, and attempted to show that it belonged to a third person, are examples. There it was held that the plaintiff in the former case might prove in rebuttal that the defendant was not at the particular place as claimed, and in the latter, that he might call the third person and show by him that he was not the owner of the property. It seems to me that this case is clearly distinguishable from the class referred to. Here no distinct independent fact was attempted to be proved by the defendants. The two witnesses for the prosecution swore that they examined the roan horse and that his tracks did not correspond with the tracks found. That was the affirmative of the issue the prosecution attempted to maintain, and it was required under the rule referred to herein, "to introduce all the evidence to make out its side of it." If the horse was not shod at the time, that was one of the best points in the proof to establish the affirmative of the issue. It was direct proof, it seems to me, and not rebutting evidence, and the defendants have the right to controvert it whenever given, or in whatever stage of the trial it was admitted. The defendants held the negative of this issue, and so long as the prosecution was allowed to give evidence to sustain the affirmative, they should have been allowed the right to disprove it. (*Shepard v. Potter*, 4 Hill, 202.)

This may appear to be a very refined view of the question, but the objection to the admission of the testimony was wholly technical. If the evidence offered had been cumulative, as contended by the counsel for the prosecution, the fact of its not having been introduced before was excused. The defendants claimed, and their counsel offered to show, that it had not been discovered until after they rested their case, and I fail to understand why it should have been rejected, if not strictly rebutting proof. The defendants were on trial for a high crime, an offense which subjected them, if established, to severe punish-

Argument for Respondent.

ment; and while they have no right to complain of its severity, where their guilt is regularly established, still they have the right to demand that the trial, to ascertain whether they are guilty or not, shall be conducted in accordance with law and justice. For the reasons here stated the judgment of conviction will be remanded for a new trial.

[Filed April 18, 1887.]

STATE OF OREGON, RESPONDENT, v. E. T. BARNETT,
APPELLANT.

LARCENY.—A person committing larceny in a foreign country, and converting the stolen property to his own use in this State, either personally or by innocent agents is guilty of larceny in this State.

APPEAL from Multomah County. Affirmed.

The facts are stated in the opinion.

Gearin & Gilbert, for Appellant.

1. The indictment does not state facts sufficient to constitute a crime.

2. The testimony shows no bailment. (Bishop on Statutory Crimes, § 423.)

3. The court had no jurisdiction to try the case.

4. The property, if stolen, was stolen without the State.

5. It is presumed the common law is in force in British Columbia.

6. Bank-notes not larceny at common law. (Wharton's Com. Law, § 1758.)

7. There is no larceny by bailee at common law.

Henry E. McGinn, and *N. D. Simon*, for Respondent.

1. The offense of larceny accompanies the stolen property. (*State v. Johnson*, 2 Or. 15; 1 Bishop on Criminal Law, §§ 136-144, inclusive.)

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2. The offense is a statutory offense. (Crim. Code, § 16; *People v. Gardner*, 2 Johns. 477; *People v. Burke*, 11 Wend. 129.)

3. This rule applies as well to statutory larcenies as to common-law larcenies. (Bishop on Statutory Crimes, § 140; *Commonw. v. Simpson*, 9 Met. 138; *Commonw. v. Rand*, 7 Met. 475.)

4. Personal presence is not essential. (Wharton's Criminal Law [8th ed.], § 279; *People v. Adams*, 3 Denio, 190; *Commonw. v. White*, 123 Mass. 430; 1 Bishop's Criminal Procedure, §§ 53-60; 1 Bishop on Criminal Law, §§ 110, 111.)

LORD, C. J.—The defendant was indicted, tried, and convicted of the crime of larceny by bailee. On the trial of the cause, it appeared in evidence that the money alleged to have been converted by the defendant to his own use was delivered to him by a witness of the name of De Wolf, for safe-keeping, and to facilitate its transportation somewhere in British Columbia. That the money was brought by the defendant in person into Pendleton, Umatilla County, Oregon, and there placed by him with the Wells-Fargo Express Company for shipment to the bank of British Columbia, in the city of Portland, Multnomah County, Oregon, and at the same time he addressed the following letter to the bank:—

“PENDLETON, Oct. 17, 1886.

“*Bank of British Columbia, Portland, Oregon.*

“*Dear Sir:* I have sent you two thousand dollars, Canadian money, by Wells, Fargo & Company's Express, to exchange for U. S. money. Please send draft on your bank to First National Bank, Pendleton, Oregon, to me.

(Signed,)

“E. T. BARNETT.”

The money and letter sent as above stated were received by the bank at the city of Portland, and in accordance with the directions or instruction of the defendant, the Canadian money was converted into U. S. money, placed in a draft and sent to the defendant at Pendleton, Umatilla County, Oregon; that he received the draft and absconded with it to Dayton, W. T. It

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was also shown in evidence, that before he had shipped the money by Wells, Fargo & Co., he represented to the witness, De Wolf, that the money had been stolen out of the saddle-bags where he had placed it, and the defendant represented constantly that the money had been stolen by the Indians. It is thus seen that the defendant came into Oregon with the property placed in his custody, denying his possession, and asserting that the Indians had stolen it, and sent it by his innocent agent into the county in which he was afterwards indicted, and by his direction had the money converted into U. S. money, and a draft made payable to him for the purpose of appropriating it to his own use, and facilitating his escape with it. Upon this state of facts, the counsel for the defendant claims that the court was without jurisdiction to try the defendant, and as a consequence, that the judgment of conviction pronounced against him is void. Virtually, this is based on two propositions: (1) That the bringing into this State by the defendant money stolen in British Columbia does not constitute an offense against the laws of this State; and (2) that not having been personally present in Multnomah County with the stolen money in his possession, the defendant could not lawfully be subjected to a trial there. The first objection raises the vexed question upon which there has been, and now is, much diversity of judicial opinion. For a collection of the authorities, and the holdings *pro* and *con* of the different States by their courts of last resort, see Bishop on Criminal Law, § 141. It was, however, at an early day held in this State, that the offense of larceny committed without the State continues and accompanies the stolen property, and that the offense may be tried in any county within the State into which such stolen property may be brought by the offender. And since this decision, it has been provided by law that: "When property feloniously taken . . . without the State, by burglary, robbery, larceny, or embezzlement, is brought within it, the action may be commenced and tried in any county therein into which such property may be brought." (Crim. Code, § 16.) The argument that a completed offense was committed before the defendant came into the State, and that his subsequent acts here could not make another,

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for which he would be liable within the jurisdiction of this State, is effectually disposed of by the statute declaring that when property so taken without the State is brought within it, the action may be commenced and tried within any county therein into which such property may be brought. The offender who has obtained a felonious possession without the State cannot bring the property stolen or embezzled within the State, with the intent to appropriate or convert it to his own use, without violating the laws of this jurisdiction and rendering him liable to its punishments. "Always," says Mr. Bishop, "when a man has with him property in the State where any legal inquiry concerning it arises, the courts look into the legal relation he sustains to it there. If he stole it in another State, he has not even the right to its custody in the new locality; and the rule in larceny is, that when a man, having in his mind the intent to steal, makes any removal or carrying of goods, to the custody of which he has no title, he commits the crime." (Bishop on Criminal Law, § 138.) "Our courts, indeed, have no occasion, neither have they jurisdiction, to try prisoners for larcenies committed abroad, against the law of foreign governments. But they can inflict punishment for offenses against our laws, and if a man has property in his hands here, they can inquire what legal relation he sustains here to this property; and if it came with him from a foreign country, the relation he sustained to it there establishes his relation to it here." (Bishop on Criminal Law, § 139.) "The proposition that a man is to escape punishment for the violation of our laws, because he first violated the laws of a foreign country, is absurd in itself, and mischievous in its practical application. Nothing is plainer than that when a man is found here with property, our courts will inquire after the owner of it, equally whether said owner is a foreigner or a citizen, present, personally, or absent. Nothing is plainer than that our courts will protect the rights of property, equally whether the property is in the owner's grasp, or wrongfully found in the grasp of a felon." (Bishop on Criminal Law, § 140.) What was the legal relation which the defendant sustained to this property which he brought within the jurisdiction of this State? Upon the

admitted facts, for the purposes of this case, the property was intrusted to his custody as a bailee. Before he reached this State, he declared to the owner of it, what in fact was false, that the Indians had stolen it, when the identical property was then in his possession, and had not been out of it. He brought that property or money into this State, still denying his possession and asserting that falsehood, and with intent to convert and appropriate it to his own use, placed it in the hands of Wells, Fargo & Co., with directions to deliver it to the bank of British Columbia, and instructed the bank by letter to exchange or discount the Canadian money for U. S. money, and for the same "to send draft on your bank to the First National Bank, Pendleton, Oregon, to me," the defendant; all of which was done and performed, and the draft received according to his direction and authority. Under this state of facts, can it be maintained that our laws have not been violated and a crime committed within their jurisdiction? It is conceded that it was the property of De Wolf, and that he was entitled to its possession, and that the defendant meant and intended to deprive him of its ownership, and to feloniously convert it to his own use. If these circumstances do not constitute the offense with which the defendant is charged, "then it is impossible for any man, under any circumstances, to do acts completely falling within the description and definition given in the books of this offense." (Bishop on Criminal Laws, § 140.) But it is said that the court had no jurisdiction to try him because he did not bring the money or property within that county. It is true the defendant did not bring the property personally within the county in which he was indicted, tried, and convicted. But the property was brought within the county by his innocent agent, under his direction and authority, and for the purpose of facilitating and completing its conversion, and putting his crime beyond the reach of discovery. It was done by the hand of another, but that hand was directed and controlled by his mind. "He who does an act in this State by an agent," said Hosmer, C. J., "is considered as if he had done it in his own proper person." (*Barkhamsted v. Parsons*, 3 Conn. 1.) In judgment of the law, he who procures the act to

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be done is present at its commission, and will not be permitted to deny that he personally committed it at the place where it was done. In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been personally present. In *Commonw. v. White*, 123 Mass. 434, the court say, by Martin, J.: "The personal presence of the thief is not always necessary to make him guilty of larceny. If he does in this State, either personally or by the hand of another, who is not principal in the larceny, all the acts which constitute the essential elements of the crime, he may be indicted and punished in this State if he can be apprehended within its jurisdiction. It is true that it has been held that when the agent is a guilty actor in the commission of the felony, he is the principal offender, and the procurer is an assessor before the fact; but when the agent is not guilty of the crime, the procurer is regarded as the principal, though absent. . . . He intrusted them to the hands of an agent, not an accomplice in the theft, and sent them into this commonwealth to be disposed of. While they were here in the hands of his agent, he had the same control and power over them as if he held them here in his own hands. His mind directed the disposition of them; he sold them to the defendant. We think the maxim, *qui facit per alium facit per se* applies, and that he was liable criminally as well as civilly for the acts of his agent, to the same extent as if done by him in person." In *People v. Adams*, 3 Denio, 210, Beardsly, J., said: "The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. What he did in Ohio was not, nor can be, an infraction of our law or a crime against this State. He was indicted for what was done here, and done by himself. True the defendant was not personally within the State, but he was here in purpose and design, and acted by his authorized agents. The agents employed were innocent, and he alone was guilty. An offense was thus committed, and there must have been a guilty offender; for it would be somewhat more than absurd to hold that any act could be a crime if no one was criminal. Here the crime was perpetrated within this State, and

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over that our courts have undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal. *Crimen trahet personam.*" Here both the principal and agent were in this State, but in different counties of it. But this does not affect the application of the rule. As said by Beardsly, J., *supra*: "That such is the rule, when both principal and agent at the time the crime is perpetrated were in the same State, although in different counties, was not denied at the argument, nor does it admit of a question." It follows that the judgment must be affirmed, and it is so ordered.

[Filed April 18, 1887.]

J. C. TOLMAN ET AL., RESPONDENTS, v. HENRY CASEY ET AL., APPELLANTS.

APPROPRIATION OF WATER—EVIDENCE EXAMINED.—*Neil v. Tolman*, 12 Or. 289, involving the same questions on substantially the same evidence, approved and followed.

PRESCRIPTIVE RIGHT—MAY SUBORDINATE OTHER RIGHTS.—When the plaintiff had a prescriptive right to the use of certain quantities of water between fixed dates, upon the public lands of the United States, one who succeeds to the title of the United States takes it subject to the rights of such appropriator, and cannot complain.

POWER OF COURT UNDER FORMER DECREE.—A previous decree had determined and settled the rights of certain of the parties in the water in controversy. *Held*, that the court below had the power, and upon proper application made for that purpose, it would fully execute such decree, and if necessary, prescribe the method of measuring the water.

APPEAL from Jackson County.

P. P. Prim, and S. B. Galey, for Appellants.

H. K. Hanna, and W. R. Andrews, for Respondents.

STRAHAN, J.—The object of this suit is to enjoin the defendants from stopping, diverting, or interrupting the flow of the waters of Neil Creek, in Jackson County, Oregon, into a certain ditch owned by the plaintiffs. The court found in favor of the plaintiffs as against the defendant Henry Casey, and dismissed

15	83
23	550
13*	668
32*	509
15	88
39	217
15	83
42	80

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the complaint as to all of the other defendants. From this decree Casey appealed, and the plaintiffs appealed from so much of the decree as dismissed their complaint against the other defendants. These appeals bring the whole case into the court for examination.

The plaintiffs allege, among other things, that in the year 1852, they and their grantors dug and constructed a ditch from what was then known as Bear Creek, now sometimes called Neil Creek, in said county, commencing at a point on said creek on or near the land now occupied by the defendant Casey, but then on government land, and from thence running in a north-westerly direction to and across the aforesaid described lands of the plaintiffs, and thereby appropriated a portion of the water of said creek. That ever since the year 1852 said ditch has been maintained continuously by plaintiffs or their grantors to conduct the water of said creek to the said lands of the plaintiffs, and the water so conducted has been, each and every year since said last-mentioned date, used by them for irrigating said lands and for watering stock, and for other domestic purposes, and that the plaintiffs are now the owners of said ditch. That from and since the year 1867 up to the decision hereinafter mentioned, plaintiffs and their grantors have appropriated and diverted the waters of said creek by means of said ditch, for the uses and purposes hereinbefore specified, as follows: From January 1st to August 15th, one hundred and sixty inches; from August 15th to September 20th, one hundred inches; and from September 20th to January 1st, sixty inches, by and under the natural flow thereof, running through a box or flume placed on a grade of three fourths of an inch to the rod. That from and after the fifteenth day of May, 1885, plaintiffs have limited the diversion and use of said water to one hundred and twenty inches, as provided by decree of this court in the two cases of *Neil v. Tolman*. That on or about the fifteenth day of June, 1885, the defendant Henry Casey wrongfully and maliciously, and with the intention of depriving plaintiffs of the beneficial use of said ditch, and of the water which was wont to flow therein from the natural and ordinary channel of said creek, obstructed the general flow

of the water in the channel of said creek at a point above and about twenty rods south of the head of plaintiffs' ditch, by constructing and placing a dam across said channel, whereby all of the water of said creek was diverted from its general flow to the head of said ditch, and whereby the plaintiffs ever since have been wholly deprived of the beneficial use of said ditch so owned by them as aforesaid, and the water of said creek so appropriated by these plaintiffs as aforesaid has wholly ceased to flow therein. The complaint then charges the other defendants with aiding and abetting and conspiring and confederating with the said Casey in the commission of said wrong. That the purpose and object of said defendants' confederation and conspiracy is to obtain, for their own use and enjoyment, all of the water of said creek, and deprive the plaintiffs of the use and enjoyment of the same, or any part thereof. The defendants Casey and William Taylor each filed separate answers; the defendant William Kincaid and eleven other defendants joined in their answers. Casey's answer denies the allegations of the complaint, except that it admits a prescriptive right in the plaintiffs to divert sixty inches of water and no more. The answer then claims that he is and has been for fifteen years the owner of an irrigating ditch taken out of the natural channel of Neil Creek at a point about twenty rods south from the head of the plaintiffs' ditch, and leading the water upon defendant's lands for irrigation and other domestic purposes, and that he has been diverting and using a portion of the water of said creek through said ditch ever since he dug it, in about 1870. That from the year 1867 to 1880 plaintiffs diverted sixty inches of water on a grade of three fourths of an inch to the rod from the channel of Neil Creek, at a point a few rods below H. W. Dyer's house, and about twenty rods below the head of this defendant's ditch aforesaid, and conducted said water thence west of north into and across an old channel, and into what is now called the plaintiffs' ditch, and through said ditch to the farms of the plaintiffs; that about the year 1880, plaintiffs ceased to divert water from the natural channel at said point into their ditch, and commenced to take the water out of the ditch of this defendant aforesaid, and to conduct said water

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from defendant's ditch along an old channel or depression to and into the head of plaintiffs' said ditch; that the plaintiffs took the water out of this defendant's ditch in 1880, without his consent, and has ever since continued to do so wrongfully and against the wish of this defendant; and that since said date, said plaintiffs have diverted more water than they did at any time prior thereto, and that for the past three years, they have and do now divert into their said ditch and carry away from said creek nearly all the water thereof during the irrigating season, to wit, more than one hundred and sixty inches, on a grade of three fourths of an inch to the rod. That about the fifteenth day of June, 1885, this defendant turned that portion of the water which he did not need for his own use out of his said ditch into the natural channel of Neil Creek, and permitted it to flow down the natural channel in its customary way without obstruction, as it was his right and duty to do. That said act of turning the water out of this defendant's ditch into the natural channel as aforesaid is the same that is complained of in plaintiffs' complaint.

William Taylor's answer, among other things, sets up that he is and has been for more than twenty years a riparian owner, residing about one mile below the head of plaintiffs' ditch on said creek, and has, during every year, used the waters of said creek for domestic purposes, and for watering his stock and irrigating the crops on said land. This answer also admits that plaintiffs have a prescriptive right to sixty inches of water, to be diverted through their ditch, and alleges that they have diverted more than that amount.

Proper replies were filed to these answers. The answers of the other defendants consisted entirely of denials.

The evidence was taken in writing upon an order of reference for that purpose, and accompanies the transcript. It is therefore necessary to determine the rights of those persons as they appear by the entire record. It will be most convenient to examine: (1) The rights of plaintiffs to the water claimed by them, and their rights to the ditch as between themselves and Casey; (2) the rights of William Taylor as riparian owner; and (3) the liabil-

ity of the other defendants under the facts disclosed by the evidence.

1. It stands admitted by the pleadings that the plaintiffs have acquired a prescriptive right as against all of the defendants, to divert and appropriate to their own use sixty inches of the water of Neil Creek. The appropriation was made in 1852 by the plaintiffs, and those under whom they claim.

In 1867 the ditch was enlarged at the lower end so as to carry the amount of water the upper end was capable of conveying. After this change the ditch evidently carried much more of the water than it had formerly, and the plaintiffs thereafter continued in its uninterrupted use and enjoyment, with the exception of some litigation with the Neils and Wimer, in all of which the plaintiffs' claims appear, to a great extent, to have been recognized and sustained. We have again carefully re-examined the evidence adduced by all the parties, and find no cause to change or vary the conclusions reached on this subject in *Neil v. Tolman*, 12 Or. 289, where the same evidence was substantially before the court on the same questions, but between different parties. We therefore hold that the plaintiffs, from the first day of January to August 15th of each year, are entitled to one hundred and twenty inches of water; from the fifteenth day of August to the twentieth day of September of each year, one hundred inches; and from the twentieth day of September to the first day of January of each year, sixty inches and no more, said water running on a grade of three fourths of an inch to the rod without any additional head or pressure; said water to be taken out of Neil Creek, where the same is now taken by the plaintiffs. But the defendant Casey insists that the plaintiffs are seeking to appropriate a part of the ditch to their own use; and this depends on the question as to where Neil Creek flowed at the time the plaintiffs appropriated a portion of its waters in 1852. On this point there is much conflict in the evidence, growing principally out of the fact, as we suppose, that at that early period but little attention was paid to the vicissitudes and changes of such a stream. One leading fact seems to be conceded by all, and that is, the creek is subject to change its channel, which is caused by

the nature of its banks and by freshets and overflows, and in this respect it does not materially differ from most other mountain streams in this State. After a very attentive and careful perusal of the evidence we are constrained to conclude that prior to 1862, the main channel of Neil Creek flowed through what was after that time called the west channel, a part of which the defendant Casey claims to have appropriated, and calls it his ditch. We have no doubt that the plaintiffs' ditch was supplied with water from this channel from the time the water was first diverted; and the change which occurred in the channel about 1862 could not and did not divest the plaintiffs of any previously acquired rights. The water which supplied their ditch flowed through this channel previous to this time, and they still had the right to supply their ditch from it. The sudden change, which we think the evidence shows then occurred, did not deprive the plaintiffs of their right to this water and the right to have it flow into their ditch from such channel, and the defendant Casey could not, by any act of his, acquire an exclusive use to this channel, or appropriate the same to his own use, or acquire any right to exclude the water from flowing through said channel into the plaintiffs' ditch; and his claim that in excluding the water from said channel he was only performing a duty to riparian owners below cannot be sustained.

2. *Right by prescription.* The rights of William Taylor as riparian owner, as well as the rights of all others similarly situated, depend so entirely upon the first question considered that little more need be said on this subject. The plaintiffs' right to this water depends upon prescription, that is, upon its appropriation and use in a manner adverse to the rights of those who now object, for more than ten years. The justice of this rule is manifest. If one goes upon the public lands of the United States and appropriates water for a lawful purpose, and is permitted to continue in its adverse enjoyment and use for more than ten years, such appropriation ripens into a title which cannot be disturbed by one succeeding to the rights of the United States. Under the particular facts disclosed by this record, this view of the subject disposes of the claim set up by the defendant Taylor.

Points decided.

3. *Conspiracy.* We have searched in vain through the evidence for any satisfactory facts disclosing a confederating or any aiding or abetting of Casey, or any conspiracy on the part of the other defendants as would sustain a decree against them, or any of them. Each of them may claim some interest in this water adversely to the plaintiffs, and he may wish to see the plaintiffs' claim defeated, and even contribute money and assist in making a defense; but none of these facts, nor all together, will, under the allegations in the complaint, subject them to a suit in equity. If the plaintiffs' suit against them had been to quiet their title to the water in question, it is possible a different rule might have been applied; but here they must succeed, if at all, upon proof of the charge of conspiracy, and that fact is not established by the evidence.

Remedies under former decree. Upon the argument, counsel for the defendants urged that the plaintiffs were taking more water than they had a right to use as defined by the decree of this court in *Neal v. Tolman, supra*. The court below has ample power to enforce that decree as well as the one we shall enter in this case, and for any violation of such decrees by any party thereto, the remedy is by an application to that court. The court has power, if necessary, to prescribe the method to be used by the plaintiffs to correctly measure the water to which they are entitled, and it is to be presumed, upon a proper application made for that purpose by any party to said suits, or either of them, the power would be exercised, if necessary, by the appointment of a receiver under section 1029 of the Civil Code.

The decrees appealed from are affirmed.

[Filed April 19, 1887.]

JAMES H. FISK, APPELLANT, v. D. V. B. HENARIE
ET AL., RESPONDENTS.

NEW TRIAL—APPEAL FROM ORDER GRANTING.—An order of a trial court granting a new trial is not appealable. There is no final judgment, and therefore no appeal.

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MOTION FOR NEW TRIAL AND FOR JUDGMENT, NOTWITHSTANDING THE VERDICT—

EFFECT OF.—When the defendant filed a motion for a new trial and a motion for judgment *non obstante verdicto* at the same time, which latter motion is allowed by the court, and final judgment rendered for the defendant, which judgment was reversed on appeal; *held*, that the motion for a new trial had not thereby been disposed of; that it was not waived, and the trial court might in its discretion allow such motion after the reversal of the judgment given, notwithstanding the verdict.

APPEAL from Multnomah County.

Williams, Ach & Wood, for Appellant.

James K. Kelly, for Respondents.

STRAHAN, J.—This is an appeal from an order of the Circuit Court of Multnomah County granting a new trial, and also from the order of said court, overruling appellant's motion for judgment on the verdict.

It is the third appeal in this cause. The ruling of this court on the first appeal is reported in 13 Or. 156; on the second appeal in 13 Pac. Rep. 193, to which reference is made for a fuller statement of the facts.

On the present appeal, two questions have been argued, and are presented for our consideration: 1st, Whether or not an appeal will lie to this from an order of the lower court, granting a new trial; and 2d, whether the defendants' motion for a new trial was pending before said court at the time the same was allowed. These questions I will now consider in the order stated. The right to an appeal depends entirely upon the statute. If the statute does not confer it, it does not exist. (*In re Goldsmith*, 12 Or. 414; *Kearney v. Snodgrass*, 12 Or. 311; *Town of La Fayette v. Clark*, 9 Or. 225.)

Order granting a new trial not appealable. The appellant relies upon section 525 of the Civil Code, which is as follows: "A judgment or decree may be reviewed as prescribed in this title, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding, after judgment or

decree, for the purpose of being reviewed, shall be deemed a judgment or decree."

It is claimed on the part of the appellant that the order of the court, granting a new trial and setting aside the verdict, is an order affecting a substantial right, and which in effect determines the action or suit, so as to prevent a judgment or decree therein.

It was held by this court in *Kearney v. Snodgrass*, 12 Or. 311, "that an order granting a new trial does not affect a substantial right"; nor do I think it is one which in effect determines the action or suit, so as to prevent a judgment or decree therein. The action is still pending and undetermined in the court below. The plaintiff, if he saw proper, might bring the same on for trial there, and recover such sum as might be awarded him upon the trial.

This statement of the case seems sufficient to show that the order in question has not determined the action so as to prevent a judgment therein. This construction is in accordance with that given a similar statute in *Artman v. West Point Manuf. Co.* 16 Neb. 572. The court there said: "By the terms of the statutes above quoted, the order sought to be reviewed must not only be an order affecting a substantial right, but it must be one which in effect terminates the action and prevents a judgment. The order in question does not do this. By this statute there are two classes of orders which may be reviewed by this court. One is where the order affects a substantial right in an action, and in effect determines the action, and the other is an order affecting a substantial right in a special proceeding. . . . It is quite clear that an order granting a new trial during the term in which the verdict of a jury is returned cannot be said to belong to the second class of orders mentioned in the section above quoted, and it is equally obvious that it must be classed with the first. If that be true, we fail to see how it can be treated as a final order, or one which determines the action. A final order is one which disposes of the cause either by sending it out of the court before a hearing is had on the merits, or after a hearing on the merits, either granting or refusing the relief demanded by the

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plaintiff." (Freeman on Judgments, §§ 29, 30, 36.) So in *Conrad v. Runnels*, 23 Ohio St. 601, the principle is thus stated: "A motion for a new trial is addressed to the sound discretion of the court; and although it is well-settled law that error will lie in a proper case where a new trial has been *refused*, we know of no case in which it has been held to lie, where a new trial has been allowed and had, and wherein the court had power to grant a new trial, and its order granting such new trial is not made ground of error by statutory provision. So in a case where a motion for a new trial is made after judgment, a party cannot appeal from such judgment while the motion is still pending and undetermined. In such case the judgment is not final." (*Kinney v. South and North Alabama R. R. Co.* 73 Ala. 536.) So, also, in *State v. Perry*, 4 Baxt. 438, under a statute which expressly authorized the Supreme Court to grant new trials, or to correct any error of the Circuit Court in granting or refusing the same. It was held that this power could only be exercised on an appeal from a final judgment in the cause, and the same construction was adhered to in *King v. Miller*, 8 Baxt. 382. In this case the court says: "The statute does not mean to give appeals from the action of a court simply granting a new trial, nor to change the long-established rule that appeals to this court can only be had from final judgments. This being an attempt to so appeal, the case is not before us, and we can take no jurisdiction of it. And in Kansas, an order of a District Court setting aside a judgment is not an appealable order. Such an order leaves the cause still pending in the lower court, and is not final. (*McCulloch v. Dodge*, 8 Kan. 476; *Kermeyer v. Kansas Pacific R. R. Co.* 18 Kan. 215.) So, also, in Florida, an order of the trial court granting a new trial is not appealable, though the action of the court in granting or refusing a new trial may be reviewed upon an appeal from the final judgment. (*Staples v. Hartridge*, 8 Fla. 426; *Dawkins v. Carroll*, 5 Fla. 407.) The same principle is, in effect, announced by this court in *Kearney v. Snodgrass*, *supra*. And these principles seem to be elementary.

In Freeman on Judgments, section 34, it is said: "The general

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rule recognized by the courts of the United States, and by the courts of most, if not all of the States, is that no judgment or decree will be regarded as final within the meaning of the statutes in reference to appeals, unless all the issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it."

The respondents submitted a motion to dismiss the appeal in this cause, which was argued and submitted by direction of the court in connection with the other questions presented for our consideration. I think, therefore, that the motion to dismiss the appeal ought to be sustained.

A motion for a new trial not waived by motion for judgment non obstante. But this would leave undetermined the main question involved and presented on the appeal, and that is, whether or not, as a matter of law, the defendants' motion for a new trial was pending in the court below on the eighteenth day of December, 1886. It is conceded that if said motion was then pending before that court, whatever ruling the court made thereon is not reviewable on this appeal, for the reason it was a matter resting on the sound discretion of the trial court.

I therefore think proper to indicate the conclusions I have reached on that subject. A brief reference to the facts is necessary to a proper understanding of this question. The verdict was rendered on the twenty-first day of May, 1886; the defendants' motion to set it aside and grant a new trial was duly filed on the twenty-second day of May, 1886; on the same day the defendants also filed a motion for judgment *non obstante verdicto*. On the first day of June, 1886, the plaintiff filed a motion for judgment on the verdict. On the twenty-sixth day of May, 1886, it appears from the record that upon the agreement of counsel for the plaintiff and defendants respectively, made in open court, it was ordered that the motions for a new trial, and for judgment for defendants, notwithstanding the verdict, and the plaintiff's motion for judgment on the verdict, be and they were set for hearing on Tuesday, the first day of June, 1886, at nine o'clock A. M., and if the court shall not then be in session, shall be heard on Wednesday, the second day of June, 1886, at the

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same hour. It further appears that on the second day of June, 1886, said cause came on for hearing upon motion for a new trial, motion for judgment on the verdict, and motion for judgment notwithstanding the verdict, and after hearing said motions and the arguments of counsel thereon, the court not being fully advised in the premises, took the same under advisement.

On the thirtieth day of June, 1886, the court made an order allowing the defendants' motion for judgment notwithstanding the verdict, and thereupon entered a final judgment in favor of the defendants, for their costs and disbursements, taxed at \$292.98. The record is entirely silent as to what disposition was made of the plaintiff's motion for judgment on the verdict, and the defendants' motion for a new trial.

From this judgment the plaintiff appealed to this court, and at the last term thereof, the same was reversed and the cause remanded for further proceedings in the court below. (13 Pac. Rep. 193.) On the twelfth day of November, 1886, the mandate from this court was duly filed in the court below, and on the twenty-ninth day of November, 1886, said cause came on to be heard on the plaintiff's motion for judgment on the verdict, which motion was opposed by the defendants' counsel, on the ground that the defendants' motion for a new trial was still pending and undisposed of, and asked that the same be heard and determined, to which counsel for the plaintiff objected for the reason: 1st, That said motion for a new trial has been determined by the court; 2d, that said motion had been waived by the defendants; 3d, that said motion had been withdrawn within the meaning of the statute governing motions for new trials; 4th, that the time for presenting a motion for a new trial had expired; and 5th, that the court had no power or jurisdiction to hear or determine the said motion for a new trial.

Upon these objections the court reversed its decision and heard counsel for the respective parties, and thereafter, on the eighteenth day of December, 1886, overruled each of said objections. The court also at the same time overruled the plaintiff's motion for judgment on the verdict, and allowed the defendants' motion to set said verdict aside, and granted a new trial, to each of which

rulings of the court the plaintiff duly excepted. Section 232 of the Civil Code defines the causes for which a new trial may be granted, and section 233 regulates the time within which a motion therefor must be filed, and is as follows:—

“Section 233. A motion for a new trial, with the affidavits, if any, in support thereof, shall be filed within one day after giving the verdict or other determination sought to be set aside. When the adverse party is entitled to oppose the motion by counter-affidavits, he shall file the same within one day after the filing of the motion. The motion shall be heard and determined during the term, unless the court continue the same for advisement or want of time to hear it. When not so heard and determined, or continued, it shall be deemed withdrawn, and may be disregarded.”

Section 262 of the Civil Code prescribes the time within which judgment shall be entered, and is as follows:—

“Section 262. When judgment is given in any of the cases mentioned in sections 260 and 261, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given, except that, as in this section hereafter provided, when a trial by this court has been had, judgment shall be entered by the clerk, in conformity with the decision, within two days from the time the same is filed; or if the trial be by jury, judgment shall be given by the court in conformity therewith, and entered by the clerk within two days from the time the verdict has been received, and in either case, within the term at which such judgment is given: 1st, When the court is in doubt what judgment ought to be given, it may order the question to be reserved for further argument or consideration; the entry of judgment shall be delayed until judgment be given; 2d, when within the time allowed to file a motion for a new trial, either party shall file a motion for a particular judgment, or for a judgment, notwithstanding the verdict or decision; or, 3d, when the motion for a new trial is filed within the time prescribed, the entry of judgment shall be thereby delayed.”

The question presented for our consideration is one of practice, depending entirely upon the construction of our own Code

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of Procedure. On such a question it is difficult to find precedent which shall be controlling; and we must therefore adopt such construction as is plainly in harmony with the legislative intent, and such as shall be convenient to the parties presenting their causes, and for the courts in considering and determining the same.

The defendants' motion for a new trial, and for judgment notwithstanding the verdict, were made at the same time, were argued together without objection, and both were taken under advisement by the court by the same order.

The defendants after that had no further duty to perform to preserve their rights. Their cause was fully submitted to the court, and if thereafter any error was committed, it was the error of the court and not the defendants. It has been argued that by sustaining the defendants' motion for judgment, both the motion for a new trial and for judgment on the verdict were necessarily overruled by implication. If this position were conceded, it would also follow that when that judgment was reversed for error, all of the consequences which necessarily followed its rendition were also cut off and defeated, and the effect of the reversal would be to re-instate the record just as it was before the error was committed. Under the peculiar circumstances of this case, I do not think we ought to hold that the defendants' motion for a new trial was either waved or withdrawn. The court did continue the motion for advisement, and at the end of the term made an order continuing over until the next term all matters that were undisposed of. (*Gomer v. Chaffee*, 5 Colo. 383; *Wade on Notices*, § 1202.) Further, under subdivision 3 of section 262, *supra*, the entry of judgment was delayed, by the filing of the motion for a new trial, until the motion is disposed of. It is very doubtful whether or not the trial court has the power to render a judgment in any case, while a motion for a new trial is pending and undisposed of. The plain duty of the court was first to dispose of the motion for a new trial, and then the record would be clear for the entry of such other order or judgment as might be proper. It is evident, from the entire record, that the action of the court

below was irregular and erroneous, and under such circumstances we ought not to enforce a rigid, technical rule, if proper under different circumstances, which would be conclusive upon the defendants, and deprive them of all remedy. Such a course of procedure would inflict the entire consequences of the erroneous action of the court upon the respondents. This, I think, would be improper. Error was committed, and it seems to me, as far as possible, the parties ought to be re-instated in the cause just as they were at the time the error was committed. No one ought to suffer by an error of the court. Upon the argument it was urged with much force that the defendants' motion for judgment, notwithstanding the verdict, and for a new trial, were inconsistent with each other; that the former motion necessarily assumed and conceded that the verdict was right, but that the complaint was insufficient. No case precisely in point was cited to support this contention, but we were referred to certain principles of common-law practice, which were claimed to apply by analogy. But I do not think the objection can be sustained. If the rule of the common law were as contended for by counsel, it referred to a mere matter of form and not of substance, which is entirely inapplicable to our system of practice under the Code. *Jewell v. Blandford*, 7 Dana, 472, expresses our views upon this subject: "If it be true that a motion in arrest is an implied waiver of a right to a new trial, should not a motion for a new trial equally operate as an implied admission that there is no cause for arresting the judgment? And, considered as an original question, is there, *should there be*, any such implied admission in either case? We think not. Indeed in England this is a mere matter of *practice* only, and arose in England, from the peculiar organization and powers of its courts. There is no *principle* in it. Our practice is different, and is, therefore, in our opinion, more consonant with justice and all the ends of the law. We do not hesitate, therefore, to decide that the motion for a new trial did not come too late in this case, and the more especially as by not objecting to it when made. The plaintiff in the action waived the technical objection which the British practice, if it had been adopted here, might have author-

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ized him *then only to make*." The like practice was observed in *Bartholomew v. Clark*, 1 Conn. 472; *Pope v. Latham*, 1 Ark. 66, although the question does not seem to have been distinctly raised, but I think it must be inferred from that case that the only reason why it was not insisted upon was that the position was regarded as unsound. The amount of the verdict in this case is sixty thousand dollars. While it is true that the absolute rights of parties do not in any way depend on the amount in controversy, still, when the amount is so large we ought to proceed with the utmost caution in reaching a conclusion. An error or mistake against the defendants in the present condition of this case would be without remedy, while on the contrary, an erroneous ruling against the plaintiff on either of the questions presented is not without remedy. The cause will still be pending in the court below for trial, and, it is to be presumed upon another trial in that court, justice will be fully and completely administered. If the plaintiff has a good and valid claim against the defendants, no doubt he will prevail upon another trial. On the contrary, if his claim is without merit, he will no doubt fail, and in either case, the ends of justice between these parties will be accomplished.

Let an order be entered dismissing the appeal.

LORD, C. J., and THAYER, J., concurred in the ruling on the motion to dismiss the appeal.

[Filed April 19, 1887.]

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STATE OF OREGON EX REL. S. C. REED, RESPONDENT, v. ELIJAH SMITH, C. J. SMITH, AND L. B. SEELEY, APPELLANTS. AND STATE EX REL. S. G. REED, RESPONDENT, v. ELIJAH SMITH, APPELLANT.

ASSIGNMENT OF STOCK.—S. being the owner of certain shares of stock assigned said shares to R. by an absolute transfer, embodying an absolute and irrevocable power of attorney, authorizing R. to transfer the stock from the name of S. to that of R. on the books of the company. The assignment was accompanied by a written agreement of the same date between the parties, providing that upon default

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in the payment of a note from S. to R., R. might sell or dispose of the stock upon such terms as he saw fit. Before the maturity of the note it caused the stock to be transferred to his own name. *Held*, that the transfer and the accompanying agreement should be considered together in fixing the rights of the parties. A pledgee of stock given as security for the payment of a note, and who is authorized by the assignment to cause the stock to be transferred to his own name upon the books of the company, has no right to cause such transfer to be made before the note matures, and an attempted transfer of that nature would not divest the pledgor of his right to vote the stock.

SAME.—It is immaterial that in such cases the by-laws of the corporation limit the right of voting the stock to stockholders, and provide that transfers shall be made only on the books of the company, and that a certified transcript thereof shall be *prima facie* evidence of the right to vote.

SAME.—Where the pledgor cast the vote of such stock and it was refused by the president, who was by the by-laws the inspector of elections of directors, and the president certified to the election of other persons than those voted for by the pledgor; *held*, that the votes should be counted as cast by the pledgor, and that the persons for whom he voted were the elected directors; that the votes, when cast, and not the certificate of the inspector, constituted the election; that the election was not affected by proceedings had at the stockholders' meeting after the president of the meeting had declared the same adjourned.

TRANSFERS OF STOCK.—The owner of stock in a corporation has an untrammelled right to dispose of it, and the by-law providing that shares of stock shall be *only* transferred upon the books of the corporation is void in so far as it attempts to limit the right of the owner to transfer his stock. Such a by-law is to be construed as simply providing for proper registration of the transfer of stock for the convenience and information of officers of the corporation.

DIRECTORS.—A *bona fide* owner of shares of stock is qualified to be a director, although the transfer has not been registered on the books of the company as provided by the by-laws.

DIRECTORS, RESIDENCE OF.—Where the objects of the corporation, as expressed by the charter, are to build and construct "railroads, canals," etc., and the corporation has already done so to a limited extent, the court will not inquire into the length, extent, or magnitude of the canals or roads in order to ascertain whether a non-resident of the State is qualified to be a director of such corporation, under the statute allowing non-residents to constitute a minority of the board of directors of corporations engaged in the construction or operation of railroads, canals, etc.

BOARD OF DIRECTORS—IRREGULAR PROCEEDINGS OF.—Where a number of directors immediately after their election, which was contested and disputed by the president of the corporation, proceed in his absence, and without any notification to him—he being a member of the board—to organize and elect a president, *held*, that the proceedings were irregular and void, and were not remedied by a subsequent action of the board ratifying and confirming the irregular proceedings. (By LORD, C. J., dissenting.)

RIGHTS OF PLEDGEE OF STOCK.—Stock having been assigned by S. to R., coupled with an irrevocable power of attorney authorizing R. to transfer the shares to his own name, R. had the right so to do before default was made in the payment of the note, and R. can vote such shares as are incident of such holding while they stand in his name and the debt is unpaid.

APPEAL from Multnomah County.

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Reversed in first case, and affirmed in the other.

Williams, Ach & Wood, for Respondent.

Dolph, Bellinger, Mallory & Simon, and *R. & E. B. Williams*, for Appellants.

THAYER, J.—These two cases come here upon appeal from judgments of the Circuit County for the county of Multnomah rendered in them severally. Each of them was an action at law brought in said Circuit Court in the name of the State upon the relation of S. G. Reed. The first one against Elijah Smith, C. J. Smith, and L. B. Seeley is for usurping, intruding into, and unlawfully holding the office of director in the Oregon Iron and Steel Company, and also upon the right of George H. Williams, Martin Winch, and William M. Ladd to the position. The second one, against said Elijah Smith, is for a like usurpation, intrusion into, and unlawfully holding the office of president of said company, and also upon the right of said Reed to the same. The two cases arise out of the same transaction, and the circumstances involved in them are so blended that they were heard together and may conveniently be considered together. The Circuit Court's findings of facts cover both cases, and include all the general matters relating to them. The following are said findings:—

1. That the Oregon Iron and Steel Company was organized under the general laws of Oregon on the twenty-second day of April, 1882, and among other specified objects and business for which it was organized it undertook "to purchase, acquire, hold, open," etc., "iron and coal mines," to purchase, construct, maintain, and operate blast furnaces, rolling-mills, nail-mills, saw-mills, machine shops, warehouses, ship-yards, and to engage in the manufacture of iron and steel, etc.; also, 4th, to construct, purchase, acquire, hold, own, improve, and operate canals, and to transport freight and passengers by steam or otherwise thereon. 5th. To build, equip, and operate a railroad from Oswego to Portland, Oregon, and to extend the same from Oswego to form a connection with any railroad in the Willamette Valley,

and to transport freight and passengers thereon; also to purchase, build, and operate railroads to connect its mines and other property with its furnace, rolling-mills, etc. 7th. To promote or facilitate and assist the construction, building, extension, equipment, and operation of any railroad line, steamship line, or steamboat line, and the formation of any companies for such purposes.

2. That the fifteenth day of June, 1886, was the date for the annual meeting of said corporation, and on that day the subscribed stock of the corporation was 7,501 shares, and a majority thereof was 3,751 shares, and there was represented at said meeting by the owners in person or by proxy (as appeared by the stock transfer books of the corporation) 5,701 shares, and according to said transfer and stock books S. G. Reed held in his name 3,422 $\frac{1}{2}$ shares, and represented the same in person, and held, as proxy for George B. Clapp, 500 shares, for H. N. Arnold 100 shares, and for A. S. Reed 400 shares, making in all which said Reed apparently represented in person and by proxy 4,422 $\frac{1}{2}$ shares of stock. That said S. G. Reed was president of said corporation and presided at said meeting, Wm. M. Ladd, vice-president, Martin Winch was secretary of said corporation, and they were both present at said meeting, and said Winch acted as secretary. Upon representations there made in effect that Elijah Smith was on his way to Portland and would probably, if the meeting was adjourned to suit his convenience, make some proposition to resuscitate and benefit the company, George A. Williams, being a stockholder present in person, moved, and it was voted to adjourn till July 1, 1886.

3. That on the first day of July, 1886, according to adjournment, the stockholders met at the place appointed, S. G. Reed, president, presiding, Martin Winch, secretary, and acting as such, and Wm. M. Ladd, vice-president, present and participating in the proceeding, and on call of stock there was 7,501 shares represented by the owners in person or by proxy, of which S. G. Reed appeared to represent in person 3,422 $\frac{1}{2}$ shares, and Geo. B. Clapp by L. B. Seeley proxy represented 500 shares. That at said meeting, and before a vote was taken for directors, L. B. Seeley claimed to own 361 shares of stock, that stood on

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the books of the company in the name of S. G. Reed, and demanded from said Reed a proxy to vote the same, which demand was answered by said Reed that said 361 shares would be voted in the usual way, and in accordance with the by-laws of the corporation, and thereupon immediately the sheriff of this county entered the room and served on said Reed an injunction issued out of this court from Department No. 2, commanding said Reed not to vote said 361 shares of said stock at said meeting, or at any adjourned meeting of said stockholders.

That Geo. H. Williams then moved an adjournment of the meeting to July 9, 1886, in order that Reed might have opportunity to apply for a discharge of the injunction which had been issued *ex parte*, and the motion was seconded and put and lost. That as to the said 361 shares of stock, the same did, prior to November 6, 1885, stand upon the stock book and transfer journal of said company in the name of L. B. Seeley; that on the twenty-seventh day of March, 1884, said Seeley assigned and delivered to said S. G. Reed said 361 shares of stock, as collateral security for the payment to said Reed of \$50,000 in two years after date, with semi-annual interest at seven per cent per annum, for which sum Seeley on that day gave to Reed his promissory note. The assignment and transfer of said stock was absolute in form and embodied an absolute and irrevocable power of attorney, directing and authorizing the transferees to transfer the same from Seeley's name to that of the transferee on the books of the company; said assignment was also accompanied by a written agreement of the same date, made by said Reed and Seeley, providing, among other things, that upon default in the payment of said \$50,000 note and interest at maturity thereof, said Reed might sell or dispose of said stock at public or private sale, and in such manner and on such terms as to said Reed should seem best; said stock remained in Seeley's name on the books of the company, and were voted by Seeley till the 6th of November, 1885, when said 361 shares, on request of said Reed, were transferred on the books of said corporation to said S. G. Reed, and the certificate thereof to Seeley was canceled, and said shares have ever since stood, and do now stand, on the books of said

company in the name of said S. G. Reed. The \$50,000 promissory note of said Seeley, for the security of which said 361 shares were assigned to said Reed, was due on the 30th of March, 1886, and the same was not paid, nor had the same been paid on said first day of July, 1886. That on the refusal of the meeting to adjourn, the usual business of an annual meeting was proceeded with, and among other things, it was voted to proceed to the election of directors for the ensuing year. There was then laid before the meeting by Joseph Simon, proxy for E. W. Creighton, a certificate of stock in the name of E. W. Creighton, and he stated that one share thereof had been assigned to Elijah Smith and one share to C. J. Smith, and the fact in regard to said two shares was that on or about the fifth day of June, 1886, said E. W. Creighton, for the consideration of \$100 cash to him paid, had assigned one share of said stock to Elijah Smith and one share to C. J. Smith, and that within a week thereafter said Creighton sent to Martin Winch, secretary of said corporation, an informal notice of said assignment, but no transfer of said two shares, or either of them, had been made on the books of the company on the fifteenth day of June, 1886, the date of the annual meeting, nor on the first day of July, 1886, the date of said adjourned meeting, but said two shares were in fact transferred on the books of said corporation from E. W. Creighton to Elijah Smith and C. J. Smith respectively on the second day of July, 1886. At said adjourned meeting, C. R. Donohue was present and voted $87\frac{1}{2}$ shares of stock in person, and also voted one share by Thos. N. Strong, proxy. E. W. Creighton was present in person, but his stock, $290\frac{1}{2}$ shares, was controlled and voted by Jos. Simon, proxy. The $290\frac{1}{2}$ shares so voted for E. W. Creighton included the two shares sold to Elijah and C. J. Smith aforesaid. At said meeting, Elijah Smith held a written proxy from Wm. Alvord, authorizing him as proxy to vote Alvord's 100 shares of stock at the annual meeting, and a telegram of date July 1st, confirming and extending the written proxy to all meetings during the year 1886, and the same were laid before the meeting. Geo. H. Williams objected to the stock of Wm. Alvord being voted by Elijah Smith, proxy, and also

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objected to L. B. Seeley's voting the 361 shares of stock standing in the name of S. G. Reed, and which said Reed had been enjoined from voting, and claimed that Seeley had no right to vote the said 361 shares. A vote for directors was then taken, and said 361 shares were voted by said Seeley for Elijah Smith, C. J. Smith, and L. B. Seeley, and the ballots laid before the president, said S. G. Reed, to be canvassed, and thereupon said Geo. H. Williams objected to the votes cast for Elijah Smith and L. B. Seeley being counted, because they were non-residents of this State, and also objected to the votes cast for Elijah Smith and C. J. Smith, because they were not stockholders within the meaning and intent of the by-laws, and objected to the said 361 shares voted by Seeley being counted. Said Reed, president, sustained the objection to the vote of said 361 shares by L. B. Seeley, and the vote of said 100 shares owned by Wm. Alvord and voted by Elijah Smith, proxy, and excluded the same from the count of votes. Mr. Jos. Simon, as proxy for said E. W. Creighton, appealed from the decision of the president, and the appeal was seconded, but the president refused to entertain the appeal, and proceeded to declare the result of the voting, and then and there excluded from the count of votes the said 361 shares of stock voted by L. B. Seeley, and the 100 shares voted by Elijah Smith, proxy for Wm. Alvord, and declared the result of the voting as follows, to wit: That S. G. Reed had received 7,040 votes; that W. S. Ladd had received 7,040 votes; that W. M. Ladd had received 3,563½ votes; that Geo. H. Williams had received 3,563½ votes; that Martin Winch had received 3,563½ votes; that Elijah Smith had received 3,476½ votes; that C. J. Smith had received 3,476½ votes; that L. B. Seeley had received 3,476½ votes.

And then he declared that S. G. Reed, W. S. Ladd, Geo. H. Williams, Wm. M. Ladd, and Martin Winch, having received a majority of all the legal votes cast, were duly elected directors of the Oregon Iron and Steel Company for the year ensuing, and a certificate of their election was in due form issued to said persons by said Reed, president. Geo. H. Williams, after the declaration of the vote, moved an adjournment and Martin Winch

seconded it, and the president put the question to vote *viva voce*, and there was a sound of ayes and a sound of noes, but no call was made for a recorded vote by ayes and noes, nor for a division and special count of votes. Whereupon the president declared the meeting adjourned. The fact was, however, there were seven persons representing a majority of the stock voting, who voted against adjournment, and four persons representing a minority of the stock voting, who voted for the adjournment. On announcing the vote and declaring the meeting adjourned, the president, with Geo. H. Williams and the secretary, Martin Winch, withdrew from the meeting, but before said Winch, secretary, had passed out of the room, the record book of the corporation, in which were recorded the minutes of stockholders' meetings, along with a part of the ballots for directors and several other papers and documents belonging to the secretary's office, were taken from him by force by L. B. Seeley. After the president, secretary, and said Geo. H. Williams had so retired from the room, the persons remaining, among whom was Wm. M. Ladd, vice-president of the corporation, proceeded to choose W. S. Ladd, chairman, and Wm. M. Ladd, secretary, and proceeded to declare what they claimed to be the true result of the above-described vote cast for directors, and as data for the same referred to tally lists kept by some of the stockholders when Reed was canvassing the vote, and to memoranda left by Winch, as well as the recollection of the stockholders present, and said persons then by vote ordered that the 361 shares voted by L. B. Seeley and the 100 shares voted by Elijah Smith, proxy, for Alvord should be counted. Said 361 shares and said 100 shares had been voted for Elijah Smith, C. J. Smith, and L. B. Seeley for directors, and the same were now counted for said parties, and said W. S. Ladd, chairman, proceeded to declare the vote as follows, to wit: That S. G. Reed had received 7,501 votes; that W. S. Ladd had received 7,501 votes; that Elijah Smith had received 3,937½ votes; that C. J. Smith had received 3,937½ votes; that L. B. Seeley had received 3,937½ votes; that Geo. H. Williams had received 3,563½ votes; that Martin Winch had received 3,563½ votes; that Wm. M. Ladd had received 3,563½ votes.

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And said W. S. Ladd, chairman, then declared that S. G. Reed, W. S. Ladd, Elijah Smith, C. J. Smith, and L. B. Seeley were elected directors for the ensuing year, and said chairman thereupon executed and issued to said persons a certificate of their election.

4. That Elijah Smith, C. J. Smith, L. B. Seeley, and W. S. Ladd, claiming to be directors of the Oregon Iron and Steel Company, by virtue of election as aforesaid, July 1, 1886, took the oath required by law to qualify directors of such corporations to act in such capacity, and on the same day, without notice to S. G. Reed, proceeded at a special meeting to organize said board of directors by choosing Elijah Smith for president, Wm. S. Ladd, vice-president, and Wm. M. Ladd, secretary, and at a regular meeting of said board, held on Tuesday, August 17, 1886, the proceedings of the said meeting of directors, held on July 1, 1886, was by vote and in form ratified, confirmed, and approved.

5. That on the sixth day of July, 1886, S. G. Reed, George H. Williams, and Martin Winch, claiming to have been elected directors of the Oregon Iron and Steel Company at the meeting of stockholders held July 1, 1886, as above described, in due form took the oath required to qualify directors of such corporations to act as such, and on the same day due notice thereof having been given to W. S. Ladd and Wm. M. Ladd, held a special meeting of said board of directors and elected S. G. Reed, president, George H. Williams, vice-president, and Martin Winch, secretary, for the ensuing year.

6. That Elijah Smith and L. B. Seeley were, on July 1, 1886, and still are non-residents of this State, and they and C. J. Smith are claiming and assuming to act as directors of said corporation, and said Elijah Smith is claiming and assuming to act as president of said corporation.

7. That if the 361 shares of stock standing on the books of the company in the name of S. G. Reed and claimed by L. B. Seeley, and voted by him, be excluded from the count of votes, the number of votes cast at said meeting for Elijah Smith, C. J. Smith, and L. B. Seeley, respectively, would be 3,576½ for each,

which is 174½ votes less than a majority of all the stock of the company.

8. That said Oregon Iron and Steel Company holds by purchase and operates a short narrow gauge railroad, from its furnace to its mine, about three miles in length. That it owns a short canal projected from Tualatin River to Sucker Lake, and has spent in and about the improvement of the Tualatin River so as to make said canal useful and in getting right of way and of flowage, and the like, about \$10,000, but said canal is not now navigable for boats, and the said company has run a preliminary survey to extend said road to their timber lands in Washington County, a few miles distant, and proposed, in case of the extension and construction of said railroad and the improvement of said canal and river, to do a general transportation business on said lines.

That Elijah Smith and C. J. Smith submitted to the stockholders' meeting, held July 1, 1886, a certificate of stock in the Oregon Iron and Steel Company, issued to E. W. Creighton for 290½ shares of the capital stock of said company, upon which certificate was indorsed an assignment and transfer of one share of said stock to Elijah Smith and one share to C. J. Smith each, under date of June 5, 1886, and said Elijah Smith and C. J. Smith, at stockholders' meeting, upon exhibiting said certificate and assignment, claimed by virtue thereof that they were stockholders of said Oregon Iron and Steel Company.

From these findings of fact the said court found the following conclusions of law:—

1. That L. B. Seeley was not a stockholder in the Oregon Iron and Steel Company as to the 361 shares of stock claimed by him and standing in the name of S. G. Reed, and was not entitled to vote said shares on the fifteenth day of June, 1886, nor on the first day of July, 1886, and said 361 shares were not entitled to be counted, when offered and cast by said L. B. Seeley.

2. That said Elijah Smith, C. J. Smith, and L. B. Seeley, not having either of them received a majority of the legal vote of the shares of the stock of said corporation, after rejecting from the count said 361 shares cast by L. B. Seeley and standing on

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the books of the company in the name of S. G. Reed, were not elected directors of said Oregon Iron and Steel Company, and are unlawfully assuming to act as such.

3. That the proceedings of the assembly of persons on the first day of July, 1886, described in the pleadings and findings of facts herein, whereof W. S. Ladd was chosen chairman, and at which a count of the votes of the stockholders of said corporation was claimed to have been made, and Elijah Smith, C. J. Smith, and L. B. Seeley were declared and elected directors of said corporation, were irregular, contrary to law, and are without force or validity.

4. That the canvass of votes by said W. S. Ladd, chairman, and the certificates of election of directors of said corporation, issued by said W. S. Ladd, chairman, were and are void and of no force or effect in law.

5. That Elijah Smith and C. J. Smith were not, nor was either of them, on said first day of July, 1886, a stockholder in the Oregon Iron and Steel Company, and neither of them was eligible to the office of director.

6. That the vote of 100 shares of stock owned by Wm. Alvord and represented by Elijah Smith, proxy, at said meeting, on July 1, 1886, was entitled to be counted, and was by said Reed unlawfully rejected.

7. That the alleged meeting of July 1, 1886, at which it is claimed Elijah Smith was chosen president of the Oregon Iron and Steel Company, was irregular and without authority of law.

8. That defendants Elijah Smith, C. J. Smith, and L. B. Seeley have each of them usurped, intruded into, and are unlawfully holding and exercising the office of directors in the Oregon Iron and Steel Company, and the plaintiff is entitled to judgment; that they and each of them be excluded from said office.

9. That Elijah Smith, defendant, has usurped, intruded into, and unlawfully holds and exercises the office of president of the Oregon Iron and Steel Company, and the plaintiff is entitled to judgment; that he be excluded from said office.

The general question to be determined here is whether the conclusions of law are warranted by the facts, and if they are not,

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then what deductions should be drawn from the facts, and the effect thereof upon the final result reached by the Circuit Court. There seems to have been an active rivalry between two sets of the parties interested in the enterprise which the corporation was organized to promote, and a considerable effort made to employ sharp practice by the respective opponents. It has resulted in a complication of the affairs of the corporation which the courts must undertake to untangle, and which presents several important and difficult questions to solve. The conclusions of law, as found by the Circuit Court as a whole, cannot, in my opinion, be sustained. I think Seeley was a stockholder as to the 361 shares of stock referred to in said first finding, and had a right to vote them on the dates therein mentioned. His assignment to Reed of said shares of stock under the circumstances and for the purposes shown by the evidence amounted only to a pledge. The agreement executed by Reed back to Seeley at the time the assignment was made clearly shows it. The transaction took place on the twenty-seventh day of March, 1884. The agreement recites that Reed was about to loan or advance to the Oregon Iron and Steel Company a certain amount of money, so that the total amount of his loan or advances to said company, including the amount theretofore loaned or advanced by him, should aggregate the sum of \$150,000, and that Seeley was willing to obtain a third interest in the said total, and had given his note of that date to Reed for the sum of \$50,000, payable two years from date with seven per cent interest, and had delivered as collateral security for said note and interest the 361 shares of stock. Therefore Reed undertook and agreed, upon the full payment of the note and interest, to redeliver to Seeley said shares of stock, etc., in consideration of which Seeley authorized and empowered Reed, upon default of the payment of said note at the maturity thereof, with the interest thereon, to sell or dispose of at public or private sale, and in such manner and upon such terms as to the said Reed should seem best, the said stock, etc. The terms of the assignment were absolute, and empowered Reed to transfer upon the books of the company the shares of stock, but did not change the character of the transaction. In Edwards

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on Bailments, section 219, the author says: "Shares of stock in a corporation are now, and have been for many years, habitually pledged as collateral security for money loaned. The pledge is made by a direct transfer of the scrip in writing, with an authority to effect a transfer in due form on the books of the corporation; and in his note for the sum loaned the borrower further authorizes the pledgee to sell the stock. The effect of the transaction is not a mortgage, but a pledge of the stock to secure the prompt payment of the money borrowed. On account of its incorporeal nature, property in stock cannot be otherwise delivered. The delivery of the scrip alone is not considered sufficient, because it does not of itself enable the pledgee to sell the stock and apply the proceeds to pay the debt. . . . The contract of pledge is entirely consistent with the owner's right as a stockholder. Until the pledge is rendered available by a foreclosure he remains a member of the corporate body, interested in its management." It cannot be maintained, I am satisfied, that the transaction amounted to anything more than a pledge, or authorized Reed to use, employ, or dispose of the shares of stock except in default of the payment of the note at its maturity, and then only by a public or private sale, and transfer of them upon the books of the company. The discussion at the hearing was quite earnest as to the necessity and effect of a transfer of shares of stock upon the company's books, the one side claiming that an assignment alone could only operate to transfer an equitable title; the other, that it transferred, in the language of section 14, chapter 7, Miscellaneous Laws, "all rights of the original holder, or person from whom the same is purchased." This point has been a source of a great deal of controversy in the courts, and attempts in many of the States have been made to settle it by legislative enactment. The State of New York, by an act passed more than sixty years ago, provided that, "in all cases where the right of voting upon any share or shares of stock of any incorporated company of that State should be questioned, it should be the duty of the inspectors of the elections to require the transfer books of said company as evidence of stock held; and all such shares as might appear standing thereon in the name of any person or

persons should be voted on by such person or persons, directly by themselves or by proxy, subject to the provisions of the act of incorporation." Another provision was also made at about the same time as the former, providing that it should be the duty of the Supreme Court, upon the application of any person aggrieved by or complaining of any election, or any proceeding, act, or matter in, or touching the same, to proceed forthwith, and in a summary way to hear the affidavits, proofs, and allegations of the parties, or otherwise inquire into the matter or cause of complaint, and thereupon to establish the election so complained of, or to order a new election, or make such order, or give such relief in the premises as right and justice might appear to the court to require. Under these two statutes it has been held by the courts of that State that the inspectors of such elections should be bound by the transfer book; but that, as errors might creep into the transfer book, it was deemed expedient to provide a mode of correcting the result of such errors. To that end the court was vested with ample power to inquire into the cause of complaint on motion, and to give relief by ordering a new election, or otherwise, as right and justice should require. (*Strong v. Smith*, 22 Sup. Ct. Rep. 234.) How said courts would have held as to such inspectors being bound by the transfer book upon a question of qualification as a voter in the absence of the statute can only be a matter of conjecture. In California, there is a statute which provides that no transfer of stock shall be valid, except between the parties thereto, until the same shall have been so entered upon the books of the company as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer. Under that statute it is held by the courts of that State that a transfer of stock until entered upon the books of the company confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. (*People v. Robinson*, 64 Cal. 375.) It was, however, held in a former case that a surviving partner had a right to vote shares of stock belonging to the partnership, although standing upon the books of the corporation in the name of the deceased partner. Cope, J., in delivering the

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opinion of the court, said: "We think that no consequence is to be attached to the circumstance that a portion of the stock represented by Hill stood upon the books of the corporation in the name of Devane alone. This was *prima facie* evidence that it belonged to the separate estate of Devane, but it was competent for the defendant to show that it was in fact the property of the partnership. The cases cited from New York proceed entirely upon a statute of that State, and the reasoning in some of the cases indicates very clearly that in the absence of the statute the conclusions would have been different. We are unable to perceive that the other authorities referred to have any bearing upon the case. It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meeting of the corporation, and the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." (*Allen v. Hill*, 16 Cal. 119.) The authority of this case does not seem to be questioned in the latter one; and from the two we may, I think, conclude that the real owner of the stock is entitled to represent it, in the absence of express law interfering with the right. In view of the New York statute referred to, "that shares of stock standing upon the books of the corporation in the name of a person or persons shall be voted on by such person or persons, directly by themselves or by proxy, subject to the provisions of the act of incorporation," we cannot expect much aid from the decisions of the courts of that State in construing the laws of this State upon the subject. And we are equally unfortunate in regard to the decisions of the California courts respecting the rights of transferees of stock before any transfer is entered upon the books of the corporation, as the statute of that State, which has been referred to, declares in express terms the effect of such transfer. We are also in the same situation, so far as I have been able to observe, with reference to most of the decisions that have been cited by counsel herein. They have generally been made under some statute that controlled them. The decision of a court of another State, when made under a statute similar in its provisions to our own, is entitled to consideration; but when it merely

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undertakes to construe a different one, it does not aid us in interpreting ours. We have a statute which requires private corporations to keep a stock book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock book, etc., shall be subject to the inspection at all reasonable hours by any person interested therein and applying therefor. (Misc. Laws, § 12, ch. 7.) But it wholly fails to declare the effect of a neglect to enter such transfer upon such stock book, or of the extent of the right of a purchaser from a holder, except as provided in said section 14 of said chapter, as before mentioned — “the rights of the original holder or person for whom the same is purchased.” It seems to me that under the statutes of this State no such consequences attach on account of a neglect to have a transfer of stock entered upon the books of the corporation, as has been held by the courts of many of the other States, and that such holding has resulted from the peculiar provisions of the statutes of those States, or of the articles of incorporation of the companies, or by-laws authorized by statute. I believe that it was the intention of the legislative assembly of this State to permit a stockholder to sell his stock to whoever he might see fit, and that the purchaser should succeed to all his rights, both equitable and legal. Certain relations exist, it is true, between corporations and their stockholders which are the subject of regulation. There are mutual obligations upon the part of the respective parties, and in order to maintain them and promote the interest of all, the corporations are empowered to make reasonable by-laws for the conduct of their affairs. This power under the statute extends to the making of by-laws, not inconsistent with existing law, for the transfer of the stock of the corporation. (Misc. Laws, subd. 6, § 5, ch. 7.) The by-laws so made have no force, however, except to regulate the relations referred to; they merely prescribe rules to be observed in the performance of acts which the members are, by tacit obligation to the body politic, required to perform. Any exaction beyond this is an absolute nullity. In the case under consideration, Mr. Seeley had a right to pledge to Mr. Reed the 361 shares

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of stock and retain the general ownership of it, and it was not in the power of the latter or of the corporation to deprive the former of any right arising out of such ownership without his consent. Mr. Reed's authority over the shares of stock was specified in the written document before referred to, and any attempt upon his part to exercise authority not therein conferred was an usurpation. It appears that Mr. Reed, without selling the stock under the power given him, and without waiting for the event to transpire which authorized him to sell it, had it transferred on the books of the company to himself. He had no more right to do that than he would have had to forcibly take the stock from Seeley's possession, and have it transferred to himself upon the books; and any countenance given to the transaction by the company made it a joint wrong-doer with him. The company had no power to sanction the act or view it in any other light than a wrong. The fact that the stock was transferred upon the books to Reed and stood in his name, unless done by consent of parties or in pursuance of lawful authority, clothed him with no rights in reference to it, nor deprived Seeley of any; nor did Reed's ruling, as president of the stockholders' meeting, that Seeley was not entitled to vote on said shares of stock, affect the question. The latter's right to so vote was derived from the law and not from Mr. Reed. He did vote, and his vote should be deemed counted. Elijah Smith, C. J. Smith, and L. B. Seeley received at that meeting a majority of the legal votes of the shares of stock of the corporation. The findings that the proceedings had on the first day of July, 1886, by the assembly of persons whereof W. S. Ladd was chosen chairman, were irregular, contrary to law, and without force or validity; that the canvass of votes by W. S. Ladd, chairman, and the certificates of election issued by him as chairman, were void and of no force or effect in law, may, in one sense, be correct. The proceedings were certainly irregular, and there was a reason for it. Mr. Reed attempted to adjourn the meeting, evidently against the consent of a majority of the holders of stock represented in person and by proxy, and he and others left before the business was done. He had, before leaving, attempted to exclude the vote on the said

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361 shares of stock, had declared himself and friends elected directors when they had not received a majority vote of the stock, and declared the meeting adjourned. Such conduct was not calculated to incite order and regularity. It was a sort of *coup d'état* movement, which he probably felt justified in resorting to in order to counteract a similar one on the part of his opponents. This left the meeting, no doubt, in a confused condition. It however reorganized by choosing Mr. W. S. Ladd, chairman, and the proceedings referred to were had, and whether the emergency authorized it or not, did not affect the legality of the election that had taken place before it occurred. The vote had then been taken and the question decided. As was said by one of the counsel for the respondent in an election contest case, while occupying a seat upon this bench, "whoever has received a majority of the legal votes cast is as much elected at the closing of the polls as he possibly can be by means of that election. The choice of the voters has become a perfect fixed fact. To make proof of that fact is all that remains to be done." (*Day v. Kent*, 1 Or. 129.) In the condition in which the meeting was left, after the president withdrew, it was doubtless embarrassing to know how to proceed or what to do. The members had a right to ascertain for their own benefit whether the result of the vote, as declared by the president, was correct or not; and if their action in the premises was entirely unofficial, I cannot see how it affects the case. Mr. Reed could not, by any erroneous ruling as canvasser of the votes, defeat any of the candidates. The will of the voter could not be thwarted in that way. This court would not certainly oust a person from the possession of an office who had received a majority of the legal votes cast for the office, because the canvasser had erroneously decided that certain of the votes cast for the officer were illegal, and had wrongfully excluded them, nor would attempt to do it because parties interested in the election had undertaken to act as canvassers and issue certificates of election where they had no authority to do so. The only question the court would attempt to determine would be, who received the requisite number of votes entitling him to the office. Under the view taken as to the right of Seeley to vote the 361

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shares of stock pledged to Mr. Reed, Mr. W. S. Ladd, Elijah Smith, C. J. Smith, and L. B. Seeley severally received a majority of the votes on all the shares of stock of the corporation for the office of director; but whether they were all entitled to such office or not depends upon other questions that have been presented for our consideration.

Residence of directors. One of the questions is, that the corporation does not come within that class of corporations that can permit a minority of the board of directors to reside out of the State, and that as Elijah Smith and L. B. Seeley were non-residents of the State at the time of the election, they were ineligible. From an inspection of the articles of incorporation, it will be seen that they include objects the corporation was authorized to carry out, which come within the proviso of the statute allowing a minority of non-resident directors; and we think the evidence tends to show that the corporation may be included in the class referred to. The reasons for adopting the said proviso do not appear from anything contained in the statute, and I doubt whether the extent of business the corporation was engaged in, or expected to engage in, was the ground for adopting it. It applies to corporations "constructing railroads or military wagon roads, canals or flumes, or publishing newspapers or conducting institutions of learning." They may be enterprises of great extent or very limited. I do not see that the legislature had in view organizations engaged in general business any more than those engaged in local matters. If it did it should have so indicated. The court could hardly be expected to determine the lengths the road should be, or size of the canal or flume, in order to decide whether the corporation constructing it had the right to permit the minority of its board of directors to reside out of the State. I do not see that the court can do more than decide whether the corporation comes within the character of organizations allowed the privilege referred to, and it seems to me that this one does.

Directors must be stockholders. Another of the questions raised by the respondent's counsel is as to the qualification of Elijah Smith and C. J. Smith to be directors. They contend that the

Smiths were not stockholders of the said corporation at the time of the election mentioned, there having been no transfer of the stock held by them made upon the company's books. Section 4, article 6, of the by-laws of the corporation provides that: "Transfer of stock shall be made *only* upon the books of the company by the holders in person or by power of attorney, duly executed and filed with the secretary of the company, and on the surrender of the certificate or certificates of such shares." Section 7, same article, provides that the secretary shall keep a transfer book, in which he shall register all transfers of stock, etc., and that such transfer book shall be closed for ten days previous to, and on the day of the annual meeting of the stockholders. These by-laws have no effect whatever upon the property rights of the stockholder; nor do they restrict his right to transfer his stock at pleasure, subject to the charter rights of the corporation. By-laws, as before suggested, have no force except as a regulation of the intercourse between the stockholder and the company. They are restrictions, as said by Beck, J., in *Farmers' and Merchants' Bank of Linnville v. Wasson*, 48 Iowa, 339, "intended for the benefit of the corporation, when its rights may be protected thereby." Such a restriction as that contained in section 4 "is necessary in order that the officers of the corporation may know who are stockholders, which is essential in conducting elections of officers, and for other matters. It can never defeat the rights of other parties, and in all cases must be regarded as a reasonable requirement. . . . If the corporation has no rights to be protected by its exercise, and other parties would be deprived of their property thereby, it cannot be enforced in such cases. Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit." The same view is expressed in *Seeligson & Co. v. Brown*, 61 Tex. 114, and in Angell & Ames on Corporations, section 357. The respondent's counsel, according to my notion, fell into an error in regard to by-laws of a corporation affecting property rights in the stock thereof. They insisted that a party might be a "stock owner" and not be technically a "stockholder," and that a purchaser of shares of stock from the holder, when not transferred upon the

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books of the company, could not vote the stock at corporation elections, or claim dividends accrued thereon, because he was not strictly a stockholder. This, as I view it, is a mistake. Such purchaser is both owner and holder of the stock, and would be so recognized everywhere except in conducting affairs with the company. The latter might very properly claim and establish that it would recognize no one as a stockholder until a transfer of the stock was made upon its books. In the case at bar the Smiths appeared at the stockholders' meeting with a regular assignment of a share of stock to each from a former holder, but without the same having been transferred upon the books of the company. That would ordinarily have been sufficient proof that they were stockholders, but not so with their dealings with the company. Its by-laws provided that the "transfer should be made only upon the books of the company by the holder in person"; and it had the right to ignore their claims to vote on the stock, or to receive dividends that might be due thereon. The corporation, through its board of directors, made the rule for its own benefit. It inconvenienced its officers in enabling them to know from an inspection of the company's books who were its stockholders, and entitled to enjoy the privileges and franchises it conferred; and it tended to avoid disputes and controversies regarding a transfer of its stock. I have no doubt but that a stockholder's right to vote on stock claimed to have been purchased, but not so transferred upon the books, or to demand dividends thereon, could be successfully challenged upon that ground alone. This, however, is the only purpose it could serve. I consider the regulation a reasonable one where the law upon the subject is reasonably construed. The Smiths stood very differently in relation to the two shares of stock from what Seeley did with reference to the 361 shares pledged to Reed. The latter was on the books in Seeley's name until the attempt was made to transfer it to Reed. The former was on the books in the name of another party, and no transfer made as provided by the by-law. Negligence might be imputed to the Smiths in not having had their shares of stock transferred to them upon the books; but it could not be charged against Seeley, he not having author-

ized it, nor being a party to it. I do not think the former would have had the right to vote upon their share of stock if they had desired to do so. But did this render them ineligible to be elected directors of the corporation? This is the most difficult question to my mind in the whole case. They were not shown to be stockholders by the books of the company, though they were such in fact, and the representative of a majority of the shares voted in favor of their election. The by-laws are silent in regard to the consequences of not having the transfer made upon the books, and the power to adopt them in the absence of express statutory authority cannot, in any case, be extended further than necessary to the protection of corporate rights. It cannot be maintained that section 4 of article 6 of the by-laws referred to has the force of a legislative enactment, or in view of the statute upon the subject, that a transfer of stock can be made only upon the books of the company. The statute provides that "the stocks in all private corporations organized under chapter 7, Miscellaneous Laws, are to be deemed personal property, and subject to attachment, execution, levy, and sale, as such; and the corporation, in case of such sale, is required to make the necessary transfer to the purchaser upon the stock book." (§ 13 of said chapter.) If such stock is personal property, subject to attachment, execution, levy, and sale as such, the holder certainly is entitled to make a voluntary sale of it without authority from the statute; but if such authority were required, section 14 of said chapter, impliedly, at least, gives it; and it will hardly be contended that a sale does not generally operate to transfer property from the vendor to the purchaser, and the same rule applies, in my opinion, to the sale of stock, whether transferred upon the stock book or not. I cannot see that the latter, as expressed in the statute, amounts to anything more than a registration of the transaction. The sale is made by the seller to the buyer. The corporation has nothing to do with it except to make the necessary entry upon the stock book, showing the fact, and as before suggested, that is evidently required for the convenience of the officers of the company in the management of its affairs. If a purchaser of stock were to neglect to have the transfer made upon

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the stock book, his dividends could be withheld, or paid to the former holder, perhaps, and should he offer to vote on the stock at a stockholders' meeting, his vote could be refused. Under the statutes of this State, I do not believe that the corporation in question had any authority to adopt a by-law limiting the right to transfer stock, as the one in question attempted to do, or that it can be construed to have any more force or effect than I have indicated. If the stockholders at the meeting referred to had refused to recognize the Smiths as stockholders, for the reason mentioned, the latter could not have justly complained, but a majority of the stockholders did not. On the contrary, they voted for their election as directors of the company. Must this court then say, as a matter of law, that they were ineligible, and that they unlawfully intruded into the office of director? In a case in 44 New Jersey Law Reports, p. 529, entitled *In re the Election of Directors of the St. Lawrence Steamboat Co.*, Depue, J., in delivering the opinion of the court, said: "The general rule is, that the books of a corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation, . . . the books of the corporation are the only evidence of who are the stockholders, and as such are entitled to vote at elections. Neither the inspector nor other stockholder can dispute the right to vote of one who appears by the company's books to be the holder of stock legally issued. . . . But with respect to the qualifications of a director, the company's books are not conclusive. A person may be qualified to be a director whose vote cannot be received at the election. He may be a *bona fide* holder of stock at that time, and yet be disqualified from voting on it by reason of the transfer not being entered on the books. He may appear as a stockholder on the books and still, for reasons *aliunde*, be disqualified for the office of the director. The question of the competency of a person for the directorship is one exclusively of judicial cognizance, over which the inspectors of the election have no jurisdiction. They have no means of making the necessary investigation on the subject, and no power to reject a competent vote because cast for a person who, in their judgment, is

disqualified for the office. . . . The question of eligibility is one that can be raised only in the courts. Independently of the statute, a person might be a director of a corporation without being a stockholder. The statute is guardedly expressed. It prescribes as the qualification of a director, that he shall be a *bona fide* holder of stock. A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and is not the property of the corporation, and the legal title is in him, he is *prima facie* capable of being a director, and his right to be a director in virtue of his legal title to such stock can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, etc. If the conclusions of the learned judge are correct, they are decisive of the question under consideration, although the view expressed may not be in every respect in harmony with our own. But the main point in the question is whether the Smiths were stockholders within the meaning of the section of our statute, which provides that no person is eligible to the office of director unless he is a stockholder in the corporation." (§ 8 of said chapter 7.) I am inclined to the belief that in view of the various provisions of the statute, and in the absence of any qualification of the right acquired by general purchase, they were. If the opposite view were to obtain, cases would be likely to arise that would present a strange anomaly. If a majority of all the stock of this corporation had, on the day of the election, stood in the name of Elijah Smith, and five or six days previous thereto it had been sold regularly upon execution, and Mr. Reed had purchased it, still Smith could have gone into the stockholders' meeting and elected himself and friends directors, although he did not legally own a cent's worth of stock at the time. It seems to me that the right to vote the shares of stock under such circumstances would be carrying the doctrine far enough without extending it to the right to elect a person director whose only title to stock was the fact that the entry of the transfer on the stock book had not been made. That would be carrying fiction, in my judgment, to

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an unreasonable extent. It would, indeed, be a sacrifice of substance to name. This disposes of the case as against the directors. The judgment against Elijah Smith for intruding into the office of president of the board of directors, I am inclined to think, should not be interfered with. The attempt upon the part of the directors, chosen under the circumstances he and his friends were, to hold a special meeting at once, without any notice to Mr. Reed, and elect officers, exhibited an indecent haste, and was irregular; nor do I think the irregularity was cured by the attempt at the subsequent meeting to ratify and confirm the proceedings of the previous one. I do not think such proceedings would be any more regular when ratified and confirmed than they were originally. The best way to legalize them is to begin over again and transact them properly. The special meeting, so called, was unauthorized, and the proceedings had thereat were a nullity, and not capable of ratification or confirmation. The result is that Elijah Smith was not president *de jure* of the board of directors. The judgment in the action against Elijah Smith, C. J. Smith, and L. B. Seeley will be reversed and the complaint dismissed, and the judgment in the action against Elijah Smith will be affirmed; costs in each case to be taxed in favor of the prevailing party.

Upon petition for rehearing.

THAYER, J.—I have examined with some care the ably-prepared petition for rehearing filed herein by the counsel for the respondent, and have endeavored to give it that consideration which the importance of the questions involved therein demand. The counsel inquire with considerable earnestness whether any one can imagine any reason for the giving of the written power of attorney by Seeley to Reed, at the time the stock was transferred by the former to the latter, excepting that it was understood and intended that Reed should transfer the stock as provided for in the power of attorney. Another inquiry might be made that would be as difficult to answer, and that is, why Seeley executed to Reed an absolute transfer and assignment of the stock, when it was understood and intended by

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them that no title to the stock was to pass from the former to the latter, beyond a right to sell it in case of a default in the payment of the \$50,000 note, and an application of the proceeds to such payment. The assignment and delivery of the 361 shares of stock, and execution of the power of attorney by Seeley to Reed, no more expresses their intention in the transaction than an absolute deed to real property from the former to the latter would, where a defeasance was given back. The deed by itself would constitute a complete conveyance of the property, but in connection with the defeasance, would be no conveyance at all; would be no more than a charge or lien upon the property. So the assignment and power of attorney, considered by themselves, would constitute a sale of the stock, with an immediate right upon the part of the purchaser to have a transfer made, from the vendor to himself, on the books of the company; but, considered in connection with the agreement made and entered into by and between the parties at the same time, might have an entirely different character. It is certain that the assignment was not intended to have any effect except as a pledge of the stock, coupled with a right to sell it in case the note was not paid at its maturity; and I concluded, when the case was heard, that the power of attorney could have no operation until such sale were made; that it was only executed for the purpose of enforcing the security in case Reed was compelled to resort to it in order to obtain payment of the note; and I therefore characterized Reed's act in having the transfer made to himself upon the books of the company, by surrendering up the stock, and having new certificates issued to himself before the note became payable as a wrong. Whether that conclusion was correct or not must be determined by an ascertainment of the intention of the parties to the transaction, and that must be gathered from the assignment and transfer of the stock, the power of attorney, and the agreement entered into between them at the time. The said agreement contains a recital that Reed was about to advance to "the Oregon Iron and Steel Company" an amount of money, so that the total amount of his advances would aggregate \$150,000; that Seeley was willing to take an

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interest of \$50,000 in the total advances made by Reed, and had given his note, of even date with the agreement, to Reed for said sum, payable two years from date, with interest, etc., and had delivered as collateral security for said note and interest, 361 shares of the capital stock, full paid, of said company. Therefore Reed undertook, upon the full payment of the note and interest, to redeliver to Seeley said shares of stock, together with one third of such bonds, etc., as he should receive from said company, in consideration of his said advances; and Seeley, in consideration thereof, authorized and empowered Reed, upon default of the payment of said note at the maturity thereof, together with the accumulated interest thereon, to sell or dispose of, at public or private sale, and in such a manner and on such terms as to the said Reed would seem best, the said 361 shares of stock. Any one having any knowledge whatever of business affairs would know at once that this agreement was the substratum of the transaction between the parties, and that the assignment and transfer of the stock, and execution of the power of attorney, which it appears was signed in blank, were for the sole purpose of carrying out the provisions of the agreement, and it seems to me that, to term this assignment and transfer of the stock anything other or different than a pledge, would be a misnomer. It is well understood that such character of property is capable of being pledged as well as sold, and that the general law relating to that subject applies to such a pledge. Reed's duty in the matter, under the law and under the agreement was, upon full payment of the note and interest, to redeliver to Seeley the 361 shares of stock; no authority was given him in the agreement to surrender them to the company, and receive other certificates in his own name. He could not become the owner of the stock by a transfer to himself, and no more, in my opinion, had he the right to clothe himself with the apparent ownership of it. He had authority to sell it, in case the note and interest were not paid when due, and make a transfer to the purchaser upon the books of the company. The power to make such transfer, it seems to me, was only to complete the sale, in case the event transpired authorizing him to make the sale. Counsel, how-

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ever, claim that it was necessary in order to protect his security, that the transfer upon the books be made to him at once; that otherwise Seeley's creditors might come forward and attach the stock and cut off the security. They do not explain how Seeley was to be protected against Reed's creditors, in case the stock is registered in the latter's name. I do not see how Seeley, especially under the view of counsel, that the registry of the stock passes the legal title, could have any protection. Reed would have the title, and his creditors, if he had any, could sequester it with impunity. It would not be necessary for them to prove that they trusted him upon the faith that he was the owner of the stock, as he would be owner in fact. But I do not think that, "unless Reed had the right to transfer the stock to himself upon the books of the company under said power of attorney, his collateral security would be of any more value to him than a chattel mortgage unrecorded, and concealed in his pocket;" or that, "prior to the time when the transfer was made upon the books of the company, any creditor of Seeley might have attached the stock, or have seized it upon execution, or Seeley might have sold it to a *bona fide* purchaser." There have been, I confess, a number of decisions to that effect, but the weight of authority is the other way. Mr. Cook of the New York bar, in a late work on the Law of Stock and Stockholders, says (§ 487): "The decided weight of authority holds, that he who purchases for a valuable consideration, a certificate of stock, is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock, for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferror to appear to be the owner of the stock upon which the attachment or execution is levied." And this author cites a large number of authorities in support of that rule.

The decisions upon the question in the different States, and in many of the States themselves, have not been in harmony. The language of Chief Justice Shaw, in *Fisher v. Essex Bank*, 71 Mass. 373, quoted in the counsel's petition, "that shares in a

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bank whose charter provides that they shall be transferable only at its banking-house, and on its books, cannot be effectually transferred, as against a creditor of the vendor who attaches them without notice of the transfer, by a delivery of the certificates, together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of the transfer be given to the bank before the attachment," instead of being authority in favor of the counsel's position upon the point, is considered in the light of the other decisions in that State, directly against it. In *Sibley v. Quinsigamond National Bank*, 133 Mass. 515, it is shown that Judge Shaw's decisions in *Fisher v. Essex Bank* was controlled by the statutes of that State expressly applicable to bank shares. Judge Allen, who delivered the opinion of the court in *Sibley v. Quinsigamond*, at page 521, says: "In *Fisher v. Essex Bank* the question was, what was the intention of the legislature of this State in using similar words (referring to the provision in the federal banking act, that the stock shall be transferable on the books of the bank in such a manner as may be prescribed by its by-laws), and the court found in the general spirit and scope of the legislation of this commonwealth, as to the attachment of shares in corporations, and in the particular legislation as to the attachment of bank shares, evidence that the legislature intended by the words 'the stock of said bank shall be transferable only at its banking-house, and on its books,' to enact that an assignment not so recorded should not be valid against attaching creditors of the assignor" Those statutes not only made the shares of any stockholder liable to attachment, but made it the duty of the officers of any corporation keeping its records to give a certificate of the shares or interest of any stockholder, on request of any officer having a writ of attachment or execution against such stockholder. "But," he says, "the statute under consideration for construction is a statute of the United States, in whose legislation no such policy existed, and whose legislative acts contained no provisions such as were referred to from the legislation of Massachusetts." And in *Boston Music Hall v. Cory*, 129 Mass. 436, 437, Judge Colt, in delivering the opinion

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of the court, says: "In the next place it is strenuously urged that, by force of the various statutes of this commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the secretary of the commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation, citing the statutes. The intent of the legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors and others interested; and although the statutes have not provided in express terms that, as to creditors, transfers shall not be valid until they are so recorded, yet such, it is contended, is the necessary implication, for otherwise, the design of the statutes requiring registration and making the shares liable to be taken for debts would be defeated. But the consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires clear provisions of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules, the delivery of a stock certificate, with a written transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor." Citing several cases, including *Fisher v. Essex Bank*, the learned judge further adds, that "it would not be in accordance with sound rules of construction to infer from the provisions of several different statutes, passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable for the protection of creditors, or for any other

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reason, it is for the legislature to make it by clear provisions, enacted for that purpose."

It is evident from these cases that Judge Shaw, in the absence of the peculiar provisions of the Massachusetts statutes referred to, would have held the direct opposite of the holding set out in the petition. That under the statutes of this State upon the subject, it may reasonably be supposed he would have decided the same way the court did in *Boston Music Hall v. Cory*, *supra*; such has been the current of decisions in the federal courts, and I am of the opinion that in the best considered cases the same result has been reached. In support of that opinion I cite, with great confidence, *Smith v. Crescent City etc. Co.* 30 La. An. 1378, and *Cormick v. Richards*, 3 Lea (Tenn.) 1. Judge Davis, in *Bank v. Lanier*, 11 Wall. 377, 378, stated explicitly what kind of security Reed had when Seeley deposited said certificates of stock with him, when he said that, "although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates. In this state of the case, Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not

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told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession." Reed being a pledgee instead of a purchaser of the stock did not render it more necessary that it should be registered in his name in order that his rights in the transaction should be protected. Holding the certificate without such registry would be more consistent and less liable to the imputation of fraud, in the case of a pledge than of a sale. But I am satisfied that in neither case could his rights be affected by any act done or suffered by Seeley subsequent to the delivery over to him of the stock, although no transfer was made upon the books of the company. Reed cannot, therefore, claim that it was necessary to his protection against the creditors of Seeley, or against the acts of Seeley himself in selling the stock to a purchaser without notice, that such transfer be made. The former had a right to have a transfer made upon the books of the company, but it seems to me that it was only a conditional right, that the parties did not intend that it should be exercised except in event of the non-payment of the note. They seem to have acted in accordance with such intention. Reed did not have the transfer made for more than a year and a half after the execution of the assignment, and in the mean time Seeley voted the stock. The transfer upon the books would put it out of the power of the latter to receive the dividends that might accrue thereon, and at the same time he had obligated himself to pay the interest upon the note semi-annually, at the rate of seven per cent per annum. I can see no justice in the right which Mr. Reed sets up. Counsel have cited a number of authorities to show that he had a right, as pledgee of the stock, to fill the blank in the assignment and have it transferred to himself. I have examined the most of these authorities, and do not think them decisive of the question under consideration, or as having much to do with it. *Day v. Holmes*, 103 Mass. 310, one of the cases cited, was an action for the wrongful conversion of certain mining stock, delivered by the defendant to the plaintiffs as collateral security for his

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indebtedness to them, with an assignment in blank, which the plaintiffs filled by inserting their own names, and obtained new certificates to be issued to themselves. This, the court said, was in no sense a sale of the stock to themselves; that the delivery of the assignment in blank necessarily implied the right to insert their own names, and the doing so, and taking out new certificates, was in accordance with the implied contract of the parties, and a lawful and reasonable measure to protect their security, and could, upon no principle, be deemed an unlawful conversion. The gist of the decision is, that the plaintiffs were not chargeable with a wrongful conversion of the stock in consequence of the filling the blank assignment and having the new certificates issued to themselves; that it was in accordance with the implied contract of the parties. It will be observed that the court also said in that case, "that it was obviously not the intention of the plaintiffs to exercise any dominion over the stock inconsistent with the rights of the defendant," that "his rights were not in fact violated or injuriously affected."

If it had appeared to the court that the plaintiffs were largely interested in the corporation that issued said stock, that their apparent object and purpose in filling the blank assignments with their own names, and having the new certificates issued to themselves, was to enable them to represent the stock at stockholders' meetings, vote it in opposition to the wishes of the defendant, and in order to secure the election of themselves and friends to the directorship of the corporation, and thereby control the management of their affairs, it would not certainly have commended the act, nor, in my opinion, have determined that they could rightfully use the defendant's stock to further any such design. *McNeil v. Tenth National Bank*, 46 N. Y. 330, another of the cases cited by counsel, was an action to compel the surrender of 134 shares of stock in the First National Bank of St. Johnsville. The plaintiff owned the stock, and delivered it to, and left it with Goodyear Bros. and Durant, stock-brokers, as collateral security for any balances that might be found due them on account of other stock they had purchased and were carrying for him. A blank assignment and power of

attorney to transfer the 134 shares was indorsed thereon, and signed by the plaintiff at the time of its delivery. Afterwards the defendant, at the request of Goodyear Bros. and Durant, paid to Fred. Butterfield, Jacobs & Co. the sum of \$45,135, and received from the former certain securities, including the 134 shares of stock as security, for the advances. Goodyear Bros. and Durant, at the time of the advances to Fred. Butterfield, Jacobs & Co., were insolvent and indebted to the defendant. In pledging the plaintiff's shares of stock, they acted without actual authority from him, and without his knowledge. He was indebted to them in the sum of \$3,000, but the account had not been rendered, or any demand made; the defendant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein. The defendant filled in the blank of the assignment and power with the name "I. H. Stout" its cashier, and attempted to have the shares transferred to his name on the books of the said First National Bank of St. Johnsville, but was prevented by injunction in the action. The balance of the advances made thereon by the defendant, less the proceeds of the other securities received therewith, was \$15,219.81, and the question for the court to determine was whether defendant was entitled to hold the 134 shares for the payment of this balance. The court of appeals held that it was; that the plaintiff by executing the blank assignment and power was, as against the defendant, estopped from asserting his ownership to the stock where the latter had made advances under the circumstances mentioned; that the signing of the blank assignment and power, and delivering the stock, was the common practice of passing the title of stock, and that it conferred upon Goodyear Bros. and Durant the apparent title thereto. The question was not as to the rights of the immediate parties to the assignment and power of attorney, but as to the rights of third persons who had advanced money upon the faith of them. If Reed had sold the 361 shares in controversy to an innocent purchaser, there is no doubt but that such purchaser would have acquired a valid title to them. But a pledgee of the stock, as between himself and the pledgor, would have no such right. Chancellor Wal-

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worth, in *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 347, used the following language: "The stock was not sold to Bartow, but was merely pledged for the security of \$10,000. He therefore had no legal right to fill up the blank with an absolute sale to himself, and a power to transfer it on the books of the bank absolutely. If the debt was not paid, he had a right to sell the pledge to a third person, after due notice thereof to Barker, and then have been authorized to fill up the blank with an absolute sale to such purchaser, and a power to transfer the stock to such purchaser on the corporation books, as that would be according to the agreement inferred from the pledge of the certificate with such blank indorsement." In that case the rights of a *bona fide* transferee were involved, who had sued the bank for refusing to permit a transfer of the stock upon its books, and the decision was placed on similar grounds to that in *McNeil v. Tenth National Bank*, *supra*; but the view enunciated by the chancellor upon the point referred to was not questioned as a logical sequence, and there is nothing, as I can see, in the way of its application to the case under consideration. The question here is between pledgor and pledgee. The obligations of each are fully set out in a written agreement.

The object of the formal assignment and power of attorney relating to the shares of stock was evidently to effectuate and carry out the purposes of the agreement; and the evident and unmistakable aim of the relator was to gain control and dominion over the shares of stock pledged, in order to enable him to retain the management of the affairs of the company, and without regard to the maintenance and protection of his security. That he had a right to have the shares transferred upon the books of the corporation, for the better protection of his security, except as before suggested, is very questionable to my mind; but that he had such right for the purposes of advancing his general interest, I do not believe; cannot think that the transaction between him and Seeley, in view of all the facts, indicates any such intention on the part of the parties, and I must still adhere to my former bluntly-expressed opinion upon that point. I do not mean to be understood as holding that a pledgee of capital

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stock in a corporation has not a right to have it transferred to him upon the books of the corporation. Many authorities, in referring to the matter in a general way, accord the right unqualifiedly, and I have met with others that deny it. In *Smith v. Crescent City etc. Co.* 30 La. An. *supra*, the court at page 1383, in referring to the convenience and value of such stock as a basis of credit, says: "The holder who does not wish to sell may pledge his certificates for loans and discounts to an amount approximating their market value, with reasonable margin for possible depreciation. The pledgee does not desire to become the owner of the stock; and he would not think it necessary, *nor would he have the right to surrender the pledged certificates, and have the stock transferred to him on the books of the corporation.*" The court here evidently meant that such right did not arise out of the mere act of pledging, and I think that would be correct except where the transfer was necessary to the completion of the pledge. A pledgee cannot be the purchaser of the thing pledged, when sold to satisfy the debt (*Bryon v. Baldwin*, 52 N. Y. 232), and he could certainly have no right to have a transfer made to himself upon the books of the corporation, unless specially granted by the pledgor; pledging the shares of stock would not of itself confer the right. *McHenry v. Jewett*, 33 N. Y. Sup. Ct. 453, is decisive of that point. In that case shares of the capital stock of the Cleveland, Columbus, Cincinnati, and Indianapolis Railway Company were pledged by the plaintiff, their owner, to the Erie Railway Company, to secure a loan of money, and by means of certain foreclosure proceedings against that company they were transferred, subject to the plaintiff's right of redemption, to the New York, Lake Erie, and Western Railroad Company. The sale under this foreclosure was made in 1878, and since that time the defendant had held the shares nominally as trustee for the last-named company. By what authority they were registered in his name as trustee had not been made to appear. It was not shown to have been done under the authority of the plaintiff in the action. "For that reason," the court said, "the defendant must be regarded as holding the shares solely under the authority created by the

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pledge, and having no greater right to make use of, or act upon them, than the relation of a mere pledge would confer. As between himself and the plaintiff in the action, that continued to be the sole measure of his rights. As the defendant had the shares simply by way of pledge or security for the repayment of money which had been loaned upon them, he could hold them only for that purpose, as long as the rights of the plaintiff to redeem them by the payment of the debt was not extinguished by a lawful sale." (*Lawrence v. Maxwell*, 53 N. Y. 19.) "They are articles of property which under such an arrangement could not be otherwise lawfully used, and, under the authorities, the defendant had no legal right to vote upon them without the express or implied assent of the plaintiff, the pledgor. This point was considered in *Scofield v. Union Bank*, 2 Cranch C. C. 115; *Vowell v. Thompson*, 3 Cranch C. C. 428; *Ex parte Wilcocks*, 7 Cowen, 402. In the last case it was held that, until the pledge was enforced and the title made absolute in the pledgee, and the name was changed on the books, the pledgor should be received to vote; that it was a question between him and the pledgee with which the corporation had nothing to do." (*Ex parte Wilcocks*, 7 Cowen, 411.) "These cases are direct and decided authorities against the right of the defendant to vote upon the shares, and the principle sustained by them has in no respect been impaired by the *Matter of Baker*, 6 Wend. 509, or the *Mohawk and Hudson Railroad Company*, 19 Wend. 135, for the disputes which were then made the subject of adjudication did not arise between parties sustaining the relation existing between the plaintiff and the defendant to this action. It was simply made a question between a person offering to vote, who was registered as trustee of the shares in the first case, and described as cashier in the second, and the corporation, whether such registry of stock authorized the person in whose name it had been made to vote upon it. No point was made in behalf of the party beneficially interested in the shares, and for that reason, the cases are inapplicable to the present controversy; for here it has been shown that the defendant, in whose name the shares had been registered as trustee, has no greater or other

right than that of a pledgee, which under the authorities determining the effect of that relation, will not permit him to vote upon them against the objection of the plaintiff, who is still to that extent entitled to dictate and direct the use which may be made of them."

The opinion of the court in the case from which this rather extensive quotation is made was delivered by Judge Daniels, who, for nearly twenty-five years past, has been upon the bench of the Supreme Court and court of appeals of New York, and whose knowledge of the various decisions of the courts of that State, and ability to discriminate between analogous ones, is not excelled by any jurist. Said opinion was concurred in by Judges Davis and Brady, the former of whom delivered the opinion in the *New York and New Haven Railroad Company v. Schuyler*, 34 N. Y. 41, to which the counsel have referred in their petition apparently with great confidence. A distinction is made in *McHenry v. Jewett*, which, in the examination of the question under consideration, is liable to be overlooked, and that is the difference in principle between a case where parties claim a right to represent stock and it is challenged by the corporation, and one where the contention is between parties beneficially interested in stock, as to which is entitled to represent it.

The corporation might not have any right to refuse to allow a party to be registered as a stockholder in the company, and to participate in the affairs of its business, while another party might very properly object to it as the exercise of unwarranted authority and a fraud upon his legal rights. A corporation is no such sacred sanctuary as is able to shield those gaining admission to it from the responsibility imposed by law. Getting shares of stock transferred to a person upon the books of the corporation does not preclude the courts from inquiring, when the matter is properly before them, by what right the transfer was made, and what immunities it confers. The records of corporation proceedings are not absolute verity, or conclusive of the right of parties under the law. They may show that a person is a stockholder in the company and entitled to vote shares of stock, when the courts, upon an investigation of the facts, would adjudge the

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contrary. The question as to who has the right to vote shares of stock must ultimately be determined by law, and as between pledgor and pledgee, it has been long since established that the right belongs to the former unless accorded by him to the latter. A stipulation to that effect upon the part of the latter, or from which it would necessarily be implied, would doubtless confer the right; but as said in *McHenry v. Jewett*, it is a question between the two parties with which the corporation has nothing to do.

Qualification of director. Upon the question whether an assignee of a share of stock is a stockholder in the company so as to be eligible to the office of director before a transfer of the stock is made upon the books of the company, I can see no reason to change my former view. The language of Rapallo, J., in *Neil v. Tenth National Bank*, quoted by the learned counsel for the petitioner, "that as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in shares, etc., and that the transferee acquires the entire right to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right to vote at elections," etc., is more in favor of that view than against it.

If it were a case where the legislature had provided that the stock should be transferable only on the books of the company, the position contended for by the counsel might be tenable; but where that is only required as a compliance with the by-laws of the company, to facilitate the management of its affairs, I cannot think it is. It seems to me that a sale of a share of stock to a party, evidenced by a written transfer and delivery of the certificate, constitutes him, under the laws of this State, a stockholder within the meaning of the statute, providing that no person is eligible to the office of director unless he is a stockholder in the corporation. Who could be the stockholder in such case except the purchaser of the share? Certainly not the seller, after having sold it, received the purchase price therefor, delivered over the certificate with a written assignment indorsed thereon, and done every act in his power to render the sale complete, although

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his name still remained upon the books of the company as owner. It might, with full as much reason, be claimed that the grantor of real property continued the owner of the fee until the grantee recorded his deed from the former. The grantor, in fact, has power over real property after executing the deed in such a case, which the vendor of stock does not possess over a share so transferred. The former by again selling the real property to an innocent purchaser might cut off the right conveyed to his first grantee, while the vendor of the stock, after delivering over the certificate with the assignment indorsed, would be wholly powerless to affect his first vendee by a second sale. The books of the corporation are evidence as to who are the holders of the stock; but not conclusive evidence upon that point. The law must ultimately determine the question from all the facts in the case. It would be carrying the doctrine of nicety to an absurd extent, to hold that a party, although he had sold out his entire stock in a corporation, or where it had been sold out upon a lawful execution against him, would still have the right, if the transfer had not been made upon the books of the company, to manage its most important affairs in defiance of the real substantial owner of the stock. Yet it seems to me that the rule contended for by the counsel, if carried out to its logical sequence, would necessarily, under certain conditions that might arise, lead to such results.

LORD, C. J., dissenting.—The memorandum, it is agreed, establishes the relation of pledgor and pledgee. The inquiry then presented is twofold, viz.: 1st, Whether a pledgee to whom is assigned a certificate of shares of stock of a corporation as collateral security for a promissory note, executed by the pledgor with an irrevocable power of attorney, authorizing such pledgee to transfer such shares to his own name on the books of the company, may, in pursuance of such power or contract, have such transfer made, and a new certificate issued to himself before default and sale; and 2d, whether, after such transfer and issuance of a new certificate, but while such debt or promissory note remains unpaid, the pledgee may, as an incident of such

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pledge or contract, vote such shares of stock. Upon the first point the case of *Rich v. Boyce*, 39 Md. 314, is decisive. The facts were these: Boyce loaned Rich a sum of money for which he took his note, and also a certificate of stock as a pledge to secure his loan. The face of the certificate declared that it "was transferable only in person or by attorney on the books of the corporation on return of this certificate." On it was indorsed a power of attorney executed by Rich, authorizing Boyce to have the stock transferred to his own name on the books of the corporation. Boyce, two days after the loan and before the maturity of the note, surrendered the certificate to the company, and a new certificate was issued to him in his own name. The note falling due, Boyce sued Rich on it.

The court say: "The sixth exception was taken to the ruling of the court below, refusing to permit the appellant to offer evidence of the market value of the pledged stock at the time it was pledged. This proof was offered upon the theory that the appellant, by delivering up to the railroad company the certificate of stock No. 727, and taking a certificate of the same number of shares of the same stock in his own name, had thereby converted the certificate No. 727, and the stock it represented, to his own use. By the power of attorney on the back of the certificate, which is proved to have been executed by the appellant, the appellant was authorized to have the stock transferred to his own name upon the books of the company; and the certificate shows upon its face that this could be done in no other way than by returning the certificate to the company and having another issued to himself. The evidence offered in this exception was therefore clearly inadmissible. The seventh exception is to the refusal of the court to permit evidence to be offered to show that the appellant had never, at any time or in any manner, authorized the appellee to surrender the stock pledged, or to have it re-issued to the appellee in his own name. As we have shown in considering the preceding exception, that such authority was given by the power of attorney indorsed on the back of the certificate, the proof offered was properly rejected. The eighth exception was taken to the rejection of proof of usage or

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custom in Baltimore City among brokers, that a pledgee has no right to surrender to the company issuing it the stock pledged, and have re-issues in his own name; but that the pledgee must retain the same as pledged until default, and if no default takes place, to return the identical stock pledged to the pledgee. The contract between the parties expressly conferred authority upon the appellee to have the stock transferred to his own name, and as that contract is perfectly plain and unambiguous in its language and terms, no evidence of usage or custom was admissible to explain or control it. The ninth exception was taken to the refusal of the court to permit evidence to be given that the appellee had neither made a demand for the payment of the note, nor offered to return the stock he pledged. The appellee was not bound to make any demand for payment of the money due upon the note, the suit itself being all the demand which the law required. Nor was he obliged to tender a return of the pledge. His contract gave him the right to hold the pledge until the note was paid. All that was required of the appellee was to have the stock ready to be returned on the payment of the money, to secure which the pledge was given. The evidence offered was therefore properly rejected." And the court further say in respect to certain prayers: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the mere exercise of an undoubted right conferred upon him by the appellant. Without such right, the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant."

Now, what are the facts in the present case? Seeley assigned and delivered to Reed a certificate of 361 shares of the capital stock of the corporation, as collateral security for the payment of a note of \$50,000 given to him by Seeley, and at the same time executed an irrevocable power of attorney authorizing Reed to transfer said shares to his own name on the books of the corporation. Before the note became due, Reed caused the stock to be transferred to his name upon the books of the corporation. Manifestly, he had the right to do this, as it was in conformity with the plain terms of the contract, and in pursuance of the

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right conferred upon him by Seeley. Nor is such transfer to his own name inconsistent with the legal relation of the parties, but necessary to render the pledgee's security available, and to protect it from attachment or execution of the creditors, if any, of Seeley, the pledgor.

"The delivery of certificates of stock," says Mr. Colebrooke, "as collateral security, with a power of attorney to transfer them to another person, confers a power coupled with an interest, and gives to any one claiming under an execution of the power a right to demand of the bank a new certificate of stock. The power thus given can only be revoked by payment of the debt for which the stock has been transferred as collateral security." (Colebrooke on Collateral Securities, § 272.) "Where," said Okey, J., "as in this case, the pledgor executes an irrevocable power of attorney, authorizing a transfer of such shares on the books of the bank issuing the same, the pledgee has a right to demand such transfer to be made." (*Dayton National Bank v. Merchants' National Bank*, 37 Ohio St. 215. See, also, *Dickinson v. Central National Bank*, 129 Mass. 279; *Gill v. Continental Gas Co.* Law R. 7 Ex. 322.) Reed, therefore, exercised an undoubted right conferred upon him by Seeley under the plain terms of the contract, when he procured the transfer of the shares to his own name on the books of the corporation. Subsequently, in July, 1886, and while the debt or note still remained unpaid, a meeting of the stockholders was convened and these shares appeared on the books of the company in Reed's name. Mr. Seeley attempted to vote these shares, but his vote was rejected. Had Reed a right to vote these shares pledged to him and standing in his name on the books of the company? "A person in whose name the stock of the corporation stands is, as to the corporation, a stockholder, and has the rights to vote upon the stock, . . . nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, providing the shares were transferred on the books of the company to the name of the pledgee." (Boynton, J., in *Franklin Bank v. Commercial Bank*, 36 Ohio St. 355.) "In the absence of restrictive statutes," says Mr. Colebrooke, "the pledgee of

certificates of stock, indorsed and transferred on the books of the company, has a right to vote at its meetings. His name appearing as stockholder upon the records of the corporation, he becomes for all purposes a stockholder. *The right to vote is an incident of the pledge, and according to the presumed intentions of the parties.* Where such stock remains in the name of the pledgor on the books of the company, the right to vote remains with him." (Colebrooke on Collateral Securities, § 283, and notes 2, 3, in which numerous authorities are cited.) Now Reed had put his name on the books of the corporation by force of the authority conferred on him by the power of attorney executed by Seeley; that power being coupled with an interest remained irrevocable until the note was paid, for which the shares of stock were transferred as collateral security. As Seeley had not paid the note the power was unrevoked, and the right of Reed to appear upon the books of the corporation as transferee of the shares was intact and according to the terms of the contract. His name thus appearing on the books of the corporation, Reed became liable to the responsibilities and entitled to the privileges of a stockholder, among which is the right to vote. As Seeley had clothed him with the power to assume such duties, responsibilities, and privileges, what right has he to complain while his note remains unpaid and the power unrevoked? When he shall have relieved himself from his default by the payment of his note he will then be entitled to a return of his collateral, or what is the same thing, a transfer of the stock, whereby he may again appear upon the records of the corporation as a stockholder, and entitled to enjoy his privileges as such.

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[Filed April 21, 1887.]

RACHEL PALICIO, APPELLANT, v. JOHN BIGNE,
RESPONDENT.

EXECUTOR OF PARTNERSHIP ESTATE.—Where it was provided by a will that the executor therein named should not be required to give bonds, and the executor, who was a partner of the deceased, administered upon the *general* estate of deceased, and also caused himself to be appointed administrator of the *partnership* estate, and retained the administration thereof after he had closed up the general executorship; *held*, (1) That he should have closed up the partnership estate first. (2) That he should be required to give bonds as executor of the partnership estate, notwithstanding the provision of the will.

APPEAL from Multnomah County.

M. G. Munly, and Watson, Hume & Watson, for Appellant.

Bigne could not act as administrator of the partnership estate without giving an undertaking.

The decedent could not dispense with this security, which is for the benefit of creditors of his estate and surviving partners. (*Cook v. Lewis*, 36 Me. 340; *Buffum v. Buffum*, 49 Me. 100; *Hill v. Treat*, 67 Me. 501; *Putnam v. Parker*, 55 Me. 235; *Bredon v. Mut. Sav. Inst.* 28 Mo. 181; *Crow v. Weidner*, 36 Mo. 412; *Collier v. Cairns*, 6 Mo. App. 188; *Adams v. Marsler*, 70 Ind. 381; *Nelson v. Haynes*, 66 Ill. 487; *Scott v. Buffum*, 52 N. H. 345.)

The extension of the probate jurisdiction to settlement of partnership matters is, under the statute, original and exclusive, and did not exist at common law. (Story on Partnership, 344; 3 Redfield on Wills, 136; Code, § 869.)

Strong & Strong, for Respondent.

There was no partnership property in the sense of the words used in the probate act. Under the Code, section 1056, page 3181, no bonds can be required of Bigne, the testator having declared that no bonds shall be required.

STRAHAN, J.—Pierre Manciet died in Portland, Oregon, on the nineteenth day of April, 1882. Before his death he made and

published his last will in due form, by the terms of which it is provided:—

“1st. It is my will that all my debts be paid as soon as may be convenient to my executor after my decease.

“2d. I do devise and bequeath to my executrix and executor hereinafter named, and to the survivor of them, or either of them, all the residue and remainder of my estate, real, personal, and mixed, of every name and nature, and wherever situate, to have and to hold the same in trust for the uses and purposes hereinafter declared, that is to say, to the sole use and benefit of my beloved wife, Petra Cortes, during her natural life, giving to her the rents and profits of the same for her use, and the interest and income from all sources, and so much of the principal of the estate as may be required to enable her to comfortably provide for her own support, and for the maintenance, support, and education of her children hereinafter named, so long as they are minors, or may be dependent upon her; and it is my wish that this support shall be furnished her, from time to time, as her necessities may require.

“At the death of my said wife, all the remainder of my said estate, at her decease, after satisfying all her just debts, to be converted into money by my said executor, or his substitute, to be appointed by the proper court, in case of his death or removal, and divided equally, share and share alike, between the following named persons, to wit: Frank Palicio, son of my wife by a former marriage, and Rachel Palicio, daughter of my said wife by said former marriage, and our children, Charles, John, Linda, Peter, Vincent, Madeline, Pauline, and Louisa.

“3d. I hereby fully empower my said executor and executrix, or either of them, if only one is acting, to have and possess the full control and management of my estate, to sell, convey, or exchange my real property, or any part of the same, and therein invest the proceeds, and to convert real estate into money, or money into rent-paying real property, bonds, mortgages, or other securities, whenever and as often as they shall deem most for the advantage of my said estate.

“Item. I make this will in the full confidence that my said

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executor and executrix, having themselves full knowledge of all the circumstances of the long copartnership between my executor and myself, will be able to settle amicably and in a liberal manner all matters relating to said copartnership.

"I hereby direct that my said executor and executrix be not required to give bonds or security for the discharge of their duties under this will, and request that no bonds be required of them.

"I hereby nominate and appoint my said wife, Petra Cortes, executrix, and my life-long friend, John Bigne, executor of this, my last will and testament."

On the tenth day of May, 1881, said will was duly proven and admitted to probate in said County Court of the State of Oregon for the county of Multnomah, and letters testamentary were, on the same day, issued by said court to said John Bigne and Petra Cortes Manciet, the executor and executrix named in said will, who immediately qualified and entered upon the duties of said trust. That on the nineteenth day of April, 1882, said Petra Cortes Manciet died, and thereafter the said John Bigne continued to act as the sole executor of said will. On the twenty-third day of March, 1882, said executor and executrix filed an inventory of said estate, and on the ninth day of September, 1885, he filed "his final report of his actings and doings as executor of the estate of Pierre Manciet, deceased." On the fourth day of November said County Court made an order allowing said account, except as to the executor's commission, from which the court deducted \$612.50. On the twenty-third day of July, 1886, Rachel Palicio filed in said County Court a petition for the removal of John Bigne from said trust, or for an order requiring him to give security as administrator of the partnership estate of Manciet and Bigne. Various and sundry irregularities are charged in said petition against said John Bigne in the conducting and management of said trust; but in the present state of this record we do not think it necessary to consider them. On the hearing of the petition, said County Court made an order requiring said John Bigne to file with the clerk of the court, within ten days after notice of such order, his undertaking as

administrator of the partnership estate of Manciet and Bigne, in the sum of \$135,450, with sureties to be approved by the judge of said court, conditioned according to law. The court also, at the same time, made an order perpetually enjoining the said John Bigne from selling, or in any manner disposing of any of the property of said estate, without the order and license of said court first had and obtained therefor. From these orders John Bigne appealed to the Circuit Court. On hearing of said appeal, the Circuit Court reversed the order of the County Court requiring him to give an undertaking as administrator of the partnership estate of Manciet and Bigne, and also gave a decree against the appellant for costs, from which decree this appeal is taken.

Power of County Court to require undertaking. The power of the County Court to require an undertaking of Bigne as administrator of the partnership of Manciet and Bigne depends upon the construction to be given section 1056 of the Civil Code, and some other sections thereof to be presently referred to. That section reads thus:—

“No executor or administrator is authorized to act as such until he shall file with the clerk of the County Court having jurisdiction of the estate, an undertaking in a sum not less than double the probable value of the estate, with one or more sufficient sureties to be approved by the county judge, to be void upon the condition that such executor or administrator shall faithfully perform the duties of his trust according to law; *provided*, that when, by the terms of his will, a testator shall expressly declare that no bonds shall be required of his executors, such executor may act, upon taking an oath to faithfully fulfill his trust, without filing the undertaking in this section mentioned. . . .”

It was conceded upon the argument, that by the terms of Pierre Manciet's will his executors were exempted from giving bond as such by the terms of the above proviso; and the question presented for our determination is, does it exempt him from giving an undertaking as administrator of the partnership of Manciet and Bigne? And it seems to me this depends altogether on the other sections of the Code applicable to that subject. Section 1069 of the Civil Code provides: “The executor or admin-

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istrator of a deceased person who was a member of a copartnership shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership, and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in such partnership property, after the payment or satisfaction of the debts and liabilities of the partnership." Section 1070 provides: "After the inventory is taken the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall, within five days from the filing of the inventory, or such further time as the court or judge may allow, apply for the administration thereof, and give the undertaking therefor as hereinafter prescribed." Section 1073 of the Civil Code provides: "In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator; but before entering upon the duties of such administration he shall give an additional undertaking in double the value of the partnership property."

In the case before us John Bigne is the surviving executor of Pierre Manciet's will, and he is also the surviving partner of the firm of Manciet and Bigne; but he never saw proper to qualify as administrator of the partnership in his capacity as such surviving partner. Therefore, whatever rights and authority he has in that behalf are such as are devolved upon him by virtue of his executorship of Manciet's will. Section 1073, *supra*, certainly does require the executor to give an additional undertaking before entering upon the duties of such administration; unless the proviso to section 1056 has repealed, by implication, so much of section 1073 as provides for an additional undertaking in cases of partnership, where the executor is relieved by will from giving the undertaking, it is plain the terms of section 1073 must be complied with. Repeals by implication are never favored by the courts, and are allowed only in cases where the conflict between the old and new statute is irreconcilable and in such direct opposition that both cannot stand. This is not true of these two provisions. Here there is no conflict. Both provisions can have

effect by applying them to the precise cases each was designed to meet. It requires a strained and unreasonable construction to make the conflict even colorable. In addition to this the proviso to section 1056 ought not to be enlarged or extended. It tends to render trusts of this nature uncertain and insecure; or, at least, it takes away one of the safeguards which is deemed proper in such cases in a very large majority of the States. It is true the legislature may allow the testator to dispense with it in the first instance, and so far as it has plainly done so it must be enforced; but it is not one of those kinds of statutes the terms of which ought to be extended to any cases not plainly within its terms.

Partnership estate should be settled first. This estate seems to have fallen into a condition of serious confusion. One grave irregularity is in the attempt of the executor to settle the estate of Pierre Manciet first and the partnership estate afterwards. This was irregular. The partnership estate must be first settled and next the individual estate. This is plainly to be inferred from section 1071 of the Civil Code. By that section the duties of the administrator of the partnership extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts or liabilities of the partnership to the *executor or general administrator*, within six months from the date of his appointment, or such further time as the court or judge may allow. And this would be true if the statute were silent on the subject. From the nature of the case the executor or administrator of the individual estate could make no final settlement of his trust until all the effects and interest of the testator or intestate in the partnership had been ascertained, settled, and paid or delivered to him. Only in this way could the property of the deceased invested in the partnership business be made available for the payment of the individual debts of the deceased partner, or for distribution. So far as appears, the executor has been making an honest effort to settle this estate, but the vagueness of the statute rendered his powers and duties somewhat uncertain. It is not clear that our statute has fully provided for such cases, or that it has given the

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County Courts powers entirely adequate to all of the emergencies of such cases ; and this applies more particularly to the ascertainment and settlement of the state of the accounts between the partners. This defect was referred to in *Burnside v. Savier*, 6 Or. 154, and in *Mann v. Flanagan*, 9 Or. 425. At a certain stage of the proceedings in the County Court the power of a court of equity was invoked, which met the approval of this court.

The views expressed require a reversal of the decree of the Circuit Court, and the affirmance of the order of the County Court appealed from.

[Filed April 21, 1887.]

STATE OF OREGON EX REL. A. J. KNOTT, ADMINISTRATOR, ETC., RESPONDENT, v. S. W. CRANE ET AL., APPELLANTS.

UNDERTAKING IN PROCEEDING FOR CONTEMPT.—Where the appellant had given an undertaking to appear and answer in criminal proceedings for contempt, and did not appear in person, but when the proceeding was called for trial appeared by counsel and contested the proceedings, and subsequently failed to pay the fine imposed and was arrested by the sheriff, and then paid the fine ; *held*, that an action could not be maintained against him to recover the sum specified in the undertaking.

SAME.—Warrant of arrest, in proceedings for contempt, should have a return day, and require the defendant to appear at a specified time.

APPEAL from Douglas County. **Reversed.**

J. F. Watson, for Appellants.

J. W. Hamilton, District Attorney, and *W. R. Willis*, for Respondent.

THAYER, J.—This suit had its origin in a suit in favor of Joseph Knott, deceased, against said S. W. Crane and Elizabeth Crane, to foreclose a mortgage executed by them upon certain premises upon which was situated a house, insured in their favor, and which had been burned, and the insurance money become payable to them. Said Joseph Knott, deeming his surety inadequate under the mortgage, had the Cranes enjoined from

collecting the insurance money in order to have it applied upon any deficiency of his debt which might be found due after a sale of the mortgaged premises and the application of its proceeds to its payment. The Cranes, however, in violation of the injunction, collected and used for their own benefit \$730 of the money, and Knott had proceedings instituted against them for a criminal contempt. A warrant was issued for their arrest, upon which they were arrested, and thereupon they, and the said W. E. Crane and E. S. Crane, entered into an undertaking, of which the following is a copy:—

“STATE OF OREGON, }
“COUNTY OF DOUGLAS. }

“In the Circuit Court of the State of Oregon for the county of Douglas.

“*State of Oregon v. S. W. Crane and Elizabeth Crane.*

“Whereas, a warrant of arrest having been issued on the twenty-fourth day of October, A. D. 1883, in the Circuit Court for the county of Douglas, charging S. W. Crane and Elizabeth Crane with the crime of contempt of court, and they having been duly admitted to bail in the sum of \$500 each, we, S. W. Crane and Elizabeth Crane, principals, of Multnomah County, State of Oregon, and E. S. Crane and W. E. Crane, sureties, of the same place aforesaid, by occupation millers, hereby undertake that the said S. W. Crane and Elizabeth Crane shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render themselves amenable to the order and process of the court, and, if convicted, shall appear for judgment and render themselves in execution thereof, or if they fail to perform either of those conditions, that we will pay to the State of Oregon the sum of \$1,000.

“Witness our hands and seals this twenty-sixth day of October, A. D. 1883.

“ELIZABETH CRANE, [SEAL.]

“S. W. CRANE, [SEAL.]

“W. E. CRANE, [SEAL.]

“E. S. CRANE.” [SEAL.]

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The case herein was an action to recover the penalty mentioned in said undertaking. It was tried by the said Circuit Court without a jury. Said court found for the respondent, and the judgment appealed from was entered thereon. The question made here is, whether the facts found by the Circuit Court are sufficient to sustain the conclusions of law. The following are said facts:—

“1. It is not true that on May 14, 1884, as alleged in the complaint, the undertaking upon which this action is based was, by the Circuit Court of Douglas County, declared forfeited or ordered prosecuted, but it is true that neither S. W. Crane nor Elizabeth Crane appeared in person at said time.

“2. That on May 20, 1884, the contempt proceeding against S. W. and Elizabeth Crane, mentioned in the complaint in this action, came on for trial, when said parties appeared by counsel and said cause was tried, and said S. W. and Elizabeth Crane were each adjudged guilty of contempt and each fined one hundred dollars, and be committed to jail one day for every two dollars of such fine, or until said fine be paid; and it was further ordered and adjudged that the undertaking set out in the complaint in this action be and the same was at said time declared forfeited and ordered prosecuted.

“3. That neither said S. W. Crane nor Elizabeth Crane were present at said trial, or at any time during the term of court at which said cause was tried and said judgment entered, nor did either of said parties appear for judgment or render themselves in execution thereof.

“4. That said S. W. Crane and Elizabeth Crane both having failed and neglected to pay said fine or render themselves in judgment therefor, on June 25, 1884, a commitment was duly issued on the judgment mentioned in finding No. 2, and said S. W. Crane was arrested by the sheriff of Douglas County and placed in jail as directed in said judgment.

“5. That the appeal from the judgment mentioned in finding No. 2 was not taken until after said S. W. Crane was arrested by the sheriff of Douglas County as mentioned in finding No. 4.”

The findings do not set out all the facts alleged in the pleadings. By reference to the answers it will be seen that an appeal was taken to this court by the said S. W. and Elizabeth Crane, from the judgment referred to in said finding No. 2, where the same was affirmed, the case remanded to the Circuit Court, and the judgment paid off, together with the costs of the appeal, which facts seem to have been conceded upon the trial hereof.

The only question that need be considered by this court is, the extent of the liability the undertaking imposed upon the parties executing it—whether, after S. W. and Elizabeth Crane had been adjudged to pay the fine, and they had paid it, an action could be maintained against them to recover the one thousand dollars specified in the undertaking—whether the Circuit Court could legally declare the undertaking forfeited after an appearance of the parties, and submission to its jurisdiction in the proceedings in contempt. It will be seen by a reference to the statute upon this subject that the undertaking is not in strict accordance with the terms prescribed therein. Section 647 of the Civil Code provides that “the defendant shall be discharged from the arrest upon executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking, etc., to the effect that the defendant will appear on such return day, and abide the order or judgment of the court or officer thereupon, or pay, as may be directed, the sum specified in the warrant.” This provision is the authority of the sheriff for requiring or accepting an undertaking, and he has no right to exact from the defendant, in such case, any other form of security for his appearance than that which it prescribes; and whatever the terms may be in an undertaking so given, its legal effect, if any is to be given to it whatever, must be determined in accordance with the provisions of said section of the Code. The previous section of the Code, section 646, provides that the court, or judicial officer, before whom the proceeding for a contempt is had, shall direct in the warrant of arrest whether the person charged may be let to bail for his appearance, and if he may be bailed, the amount in which he may be let to bail; and the conditions of the undertaking provided for in section 647 seem to

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be in the alternate—that the defendant will appear and abide the order or judgment of the court, etc., or *pay as may be directed*, the sum specified in the warrant. It differs materially from a recognizance. In the latter, the recognizor acknowledges himself indebted in a sum of money to be paid, etc., if he failed to do some act. In order to discharge himself from the debt he must do the act, while in the former case the party obligated undertakes that he will do one of two things; he will either appear and abide the order of the court, etc., or he will pay the amount in which he is admitted to bail, as may be directed in the warrant of arrest. The Supreme Court of the Seventh Judicial District of the State of New York, in the case of *Barton v. Butts*, 32 How. 456, held that, where a party was arrested upon an attachment for contempt, and had given a bond with sureties for his appearance at court, to abide the order of the court, and had been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute did not authorize the bond to be prosecuted at the same time that a warrant of commitment was issued against the party; that it was not the policy of the statute to give the aggrieved party two final and complete remedies for the same offense. I am inclined to the opinion that the same construction should be given the statute in question; that a party charged with being guilty of a contempt, and having executed an undertaking that he will appear and answer to it, cannot be tried for contempt, and be prosecuted upon the undertaking at the same time, nor after having been punished for contempt. I do not see how the Circuit Court could have determined that said S. W. Crane and Elizabeth Crane did not appear and abide the judgment of the court in the said proceeding, or failed to pay the fine. They were tried, found guilty, and fined, and paid the fine; they did not appear in person, but appeared sufficiently to give jurisdiction to the court to punish them, and I should think that would be about as much of an appearance as was necessary. The warrant was irregular in not requiring them to appear at a specified day. Such a writ should have a return day. I judge this had none from the language of the under-

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taking, and draw my conclusions from that. There is a feature in the case which tends to prejudice the appellants. The parties, S. W. and Elizabeth Crane, disobeyed an injunction issued out of the court, and they should have been punished severely for that, and I apprehend that they have not been. Section 650 of the Civil Code provides for giving judgment, in such a case, that the party aggrieved recover of the defendant a sum of money sufficient to indemnify them. I do not see why, under this section, a recovery was not allowed in favor of Knott for the \$730, and interest thereon, when the fine was imposed. The court had the same authority to allow this that it did to adjudge the fine; but this was a matter for the Circuit Court, and there probably was a good reason for not giving such judgment. Because it was not done or a larger fine imposed is no reason, however, for giving the statute a different construction than that indicated. It must have the same interpretation in this case as in any other; and the view I take of it is, that there was no liability upon the undertaking after the proceeding was had in the matter of contempt.

The judgment appealed from must, therefore, be reversed, and the case remanded to the Circuit Court, with directions to dismiss the complaint.

[Filed April 24, 1887.]

FREDERICK WILLER, RESPONDENT, v. THE OREGON RAILWAY AND NAVIGATION COMPANY, APPELLANT.

PRESUMPTIONS AFTER VERDICT.—If the complaint contains any allegations under which any evidence might have been introduced which would have authorized the verdict given, this court is bound to presume that such evidence was actually introduced, and that the verdict was based thereon.

PROFITS—SPECULATIVE DAMAGES.—Generally too remote to furnish a basis for recovery.

CASE IN JUDGMENT.—Where the entire tenor of the complaint showed the object of the action was to recover damages for the wrongful deprivation of the use of land, the court will give it that construction after verdict, although the gains from the use of the lands are called *profits*.

15	153
19	517
13*	768
26*	622

15	153
30	419

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APPEAL from Multnomah County.

Dolph, Bellinger, Mallory & Simon, for Appellant.

1. There can be no recovery based upon the *net profits* of the farm. (*Rhodes v. Baird*, 16 Ohio St. 573; *Griffin v. Colver*, 16 N. Y. 489; *Barnard v. Poor*, 21 Pick. 381; *De La Zorda v. Korn*, 25 Tex. Sup. 188.)

2. The general damages laid in the declaration in the ordinary form is distributable over the general counts in the declaration. (1 Sutherland on Damages, 760.)

3. It was error to render a judgment larger than is recoverable under the allegations of the complaint.

G. G. Ames, for Respondent.

1. That the twenty acres of land are rendered of no value is a proper element of damages. (*Tippen v. Ward*, 5 Or. 450; *Marsh v. Trullinger*, 6 Or. 356.)

2. The third assignment of damages is a proper and sufficient allegation of damages, and will sustain a judgment.

3. Had improper evidence been submitted, prejudice would have appeared in a bill of exceptions. Evidence of profits are often allowed as an element of damages. (*Nebraska City v. Campbell*, 2 Bland, 590; *P. W. & B. R. R. Co. v. Howe*, 13 How. 307, 344.)

4. The objection comes too late after verdict and judgment. (Pomeroy's Rem. and Rem. Rights, §§ 435, 549, 566; Bliss on Code Pleading, §§ 438, 442; see especially § 439; *Davidson v. O. & C. R. Co.* 11 Or. 136; *David v. Waters*, 11 Or. 448; *Osborn v. Graves*, 11 Or. 526.)

STRAHAN, J.—On the trial of this cause in the court below the plaintiff recovered a judgment for six hundred dollars. The only material question presented on this appeal is whether or not the allegations of the complaint are sufficient to sustain the judgment. As much of the complaint as is necessary to be stated is as follows: "That the plaintiff, prior to the time above mentioned, had two steamboat landings on the banks of the Colum-

bia River and on the premises described in the pleadings, and that the steamboats which navigated the said river were accustomed to land thereat and to discharge supplies for the plaintiff, and to take on his farm produce, and to ship the same therefrom; that one of the said landings was at a point adjacent to the west side of the projection and elevation known as Table Rock, and was used as a landing place as aforesaid by the plaintiff at the time of low water; that the other one of said landings was at a point about four hundred and thirty feet west of the first-mentioned landing, and was the terminus of a certain county road, and was used by the plaintiff in time of high water for the purpose aforesaid. That the plaintiff had, prior to the twenty-eighth day of May, 1881, constructed, opened, and maintained a farm-way or road from the said steamboat landing on his said premises to the southern portion of his said farm, connecting the said landing with the improved portion of his said farm and the buildings thereon. That on or about the twenty-eighth day of May, 1881, the plaintiff sold to the defendant, the said O. R. & N. Co., the following estate in the above-described parcel of land: 'A strip of land one hundred feet in width, being fifty feet in width on each side of and parallel with the center line of the main track of the O. R. & N. Co.'s railroad, as the same is staked out and located over and across the above-described land of Frederick Willer, to have and to hold the same unto the said O. R. & N. Co., its successors and assigns forever, for the purpose of building, operating, and maintaining a railroad thereon.' That at the time of the said sale by the plaintiff to said O. R. & N. Co., and as a part of the consideration therefor, the defendant covenanted and agreed with the said plaintiff that it would construct, provide, and maintain two wagon-road crossings across the railroad track, by it to be constructed across the above-described premises and across the land so conveyed by the said plaintiff to the defendant. That by the said agreement one of said wagon-road crossings was to be near the western base of Table Rock just west of the point where tunnel No. 1 pierces said Table Rock, and at a point where said right of way crossed said farm-way of plaintiff, and the other crossing was agreed to

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be where the county road crossed the said railroad line at a point about five hundred feet west of the base of said Table Rock; that pursuant to said contract of sale and purchase the defendant entered upon said premises in the year 1881 and constructed its railroad thereon and across said premises; that the defendant failed and neglected to construct or provide the wagon-road crossings, or either of them, pursuant to the terms of said agreement, or at all, or maintain the same.

“That at the points where said railroad crosses said farm-way of the plaintiff, the said railroad track is elevated above the level of the earth adjacent thereto about thirty feet, and that within the limits of said one hundred feet aforesaid, so granted by plaintiff to defendant, the embankment leading to the top of the railroad track rises at an angle of more than forty-five degrees; that the said embankment within said one-hundred-foot limit is rocky, rough, and inaccessible for wagons and teams. That the railroad is so constructed, that at the points of said crossing of the said farm-way, it wholly cuts off the plaintiff from all access to the Columbia River; that said railway track separates the farm of the plaintiff into two tracts; that between said railroad track and the Columbia River, the plaintiff owns a tract of about twenty acres of pasture and meadow land, and that the same was of the value of twenty dollars per acre; that said farm-way was and is the only means of access to said twenty-acre tract, and that said railroad has cut off the said land and rendered the same inaccessible and of no value. That the use of said twenty-acre tract was reasonably worth the sum of fifty dollars per annum; that since the defendant entered upon the premises aforesaid and commenced the construction of its railroad, the use of said tract of land has been worth nothing by reason of the same; that on the south side of said railroad track the plaintiff had cleared and improved a portion of his farm and erected his farm buildings thereon; that the farm-way above mentioned was the only means of access to the Columbia River; that plaintiff has no other road or means of access to his said farm other than by the Columbia River, by means of steamboats; that the defendant by constructing its railroad in the manner aforesaid, and by failing and neg-

lecting to construct and maintain the said crossings over its road, cut the plaintiff off from market and from all communication with the Columbia River and the steamboats plying thereon; and the plaintiff was damaged thereby in the sum of seven hundred and fifty dollars, in the manner following, to wit: That at the time the defendant entered upon and took possession of the premises in the manner aforesaid, the net profits of the said farm of the plaintiff were reasonably worth seven hundred and fifty dollars, from the twenty-eighth day of May, 1881, to the present time; but that the defendant by cutting off all access to the said farm, and by depriving the plaintiff of access to market, deprived the plaintiff of all profits therefrom, and *rendered the possession thereof of no value to the plaintiff*. That the plaintiff has been damaged by the failure of the defendant to construct and maintain the crossings aforesaid in the sum of fourteen hundred dollars."

No exceptions were taken upon the trial either to the admission or exclusion of evidence, or to instructions given to the jury or refused. Nor is it now claimed or pretended that there was any error committed by the court in any of these particulars.

The errors assigned in the notice of appeal are:—

1. Error of the court in denying the defendant's motion for a new trial.
2. Error of the court in rendering judgment for the plaintiff for any other or greater sum than two hundred and fifty dollars.
3. Error of the court in rendering judgment herein.

The first and third errors assigned were not insisted upon at the argument, and we therefore think it unnecessary to notice them.

Damages—Pleading. The second assignment of error is the only one relied upon. On the argument, counsel for the appellant insisted that the complaint, properly construed, would allow the plaintiff to recover for the use of twenty acres of land for five years at fifty dollars per year, and that it was not broad enough to include any other items of damages. In this counsel for appellant is mistaken. It is true there is a great deal of surplusage in the complaint, and its real force is weakened by its redun-

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dancies; but after verdict, if there are any allegations in the complaint under which evidence might have been introduced which would have justified the verdict, we are bound to presume it was introduced and that the verdict is based thereon. The general rule on the subject of recovering profits as damages is undoubtedly as contended for by counsel for appellant. They are speculative and too remote to furnish the basis of a recovery; but this rule is not without its exceptions. But in this case the allegations of the complaint, or some of them, were broad enough to admit a wider inquiry upon the trial than that contended for by appellant. Besides this we think after verdict, and for the purpose of overthrowing it, the allegations of the pleadings ought not to receive a narrow or illiberal construction, but on the contrary, it ought to be liberally construed with a view to substantial justice between the parties. (Civ. Code, § 83.) Taking this entire pleading together, and construing its allegations according to the requirements of the Code, the allegations in relation to the *profits* mean no more than that the *use* of said premises were worth the amount stated during the period specified.

The judgment appealed from must be affirmed.

[Filed April 25, 1887.]

LOUIS BELFILS, APPELLANT, v. A. C. FLINT,
RESPONDENT.

FORCIBLE ENTRY, SERVICE OF SUMMONS IN.—Section 8 of the Justice's Act, providing that the defendant shall be required to appear not less than six nor more than twenty days from the date thereof, does not apply to actions of forcible entry and detainer.

SAME.—Section 4 of the Forcible Entry and Detainer Act only prescribes that the service is to be made in the same manner, and a return be made as in other cases, and defendant in such case may be required to answer not less than two nor more than four days after service.

SUMMONS, PROOF OF SERVICE OF.—A return to a summons which fails to show that a copy of the complaint certified to by the justice of the peace, before whom the cause was pending, or by the plaintiff or his agent or attorney, is insufficient to sustain a judgment by default.

APPEAL from Douglas County. Reversed.

Wm. R. Willis, for Appellant.

1. The summons requires the defendant to appear at an earlier day than allowed by law, and a judgment given in such a case will be set aside. (*Hunsucker v. Coffin*, 2 Or. 107, 111.)

2. In this case the justice's docket shows no return, and the return on the summons does not show that a certified copy of the complaint was served. (Code, p. 115, § 54, and p. 463, § 7; *York v. Crawford*, 42 Miss. 508; *Davis v. Patty*, 42 Miss. 509; *Hendley v. Baccus*, 32 Tex. 328.)

3. A continuance was granted in this case on motion of plaintiff for more than two days. That this was error, see Code, p. 614, § 6. That such a continuance is a discontinuance of the action, see Cowan's Treatise, § 1227; *Stadler v. Moore*, 9 Mich. 264; *Brady v. Tabor*, 29 Mich. 199; *Sculler v. George*, 31 N. W. Rep. 841.

The complaint does not state facts sufficient to constitute a cause of action, in that it does not show that plaintiff has ever been in possession of said premises. (*Treat v. Stuart*, 5 Cal. 113; *Preston v. Kehoe*, 15 Cal. 315; *Warburton v. Doble*, 38 Cal. 619; *Smith v. Galbraith*, 11 Or. 516.)

W. T. Hume, for Respondent.

LORD, C. J.—This was an action brought in a Justice's Court to recover the possession of certain premises under the Forcible Entry and Detainer Act. Judgment went against the defendant Belfils in that action, for the possession of the premises for want of an answer. He then applied to the Circuit Court, and obtained a writ of review, which, upon the hearing, that court dismissed, and judgment was entered in accordance therewith, from which he appeals to this court.

Summons, when returnable. The first assignment of error is to the effect that, in an action of forcible entry and detainer, a summons which requires the defendant to appear and answer in less than six days after its date is void. The summons was dated October 15, 1886, and required the defendant to appear before the justice on the nineteenth day of October, 1886. The objec-

tion is based on the assumption that section 8 of the Justice's Act (Code Civ. Proc. 463), is applicable to actions of forcible entry and detainer. That section provides that the summons must require the defendant to appear at a time named therein, not less than six nor more than twenty days from the date thereof. Section 4 of the Forcible Entry and Detainer Act provides that the action, except as hereinafter specially provided, shall be in all respects conducted as other actions before justices of the peace. Section 5 provides that "the summons shall be served and returned as in other cases. Such service shall not be less than two nor more than four days before the day of trial appointed by the justice." (Misc. Laws, 614.) It is argued that by force of these provisions, and particularly the words "shall be served and returned as in other cases," section 8, *supra*, as to time, applies, and consequently that the summons was void, as the justice could not bring the cause to trial in less than six days.

We are not able to concur in this result. The language referred to, "served and returned as in other cases," only means that the service is to be made in the same manner, whether personally or otherwise, as is done in other cases, and that when done, the officer make a return thereof to the court—a report showing the manner in which he performed the duty imposed upon him—as is done in other cases. It has no reference to the time prescribed by section 8 for other actions, as section 5 shows it was the evident intention to make the time less than that prescribed by section 8. It only indicates that the modes of doing these official acts is the same as in other cases, although the time of appearance of the defendant is shortened after service has been obtained in this character of action. The action of forcible entry or unlawful detainer is a summary proceeding, devised to secure a speedy restitution of the premises forcibly or unlawfully detained. This being its object, the purpose of section 5, *supra*, is intended to aid in giving it that effect, which is inconsistent with the construction claimed.

It is next assigned as error that the court lost jurisdiction by granting a continuance for more than two days. The transcript

shows that the first service was deemed defective, and that the action was continued in order that another summons might be served. For myself, I do not think this was a continuance within the meaning of section 6, "that no continuance shall be granted for a longer period than two days, unless the debt," etc., or that the authorities cited sustain a contrary view. But this assignment becomes unimportant and unnecessary to decide, in view of the fact that the service of the second summons is deemed - fatally defective.

Proof of service of summons. The return on the summons does not show that a certified copy of the complaint was served. It is assumed that a justice of the peace is authorized to certify to the copy of the complaint, although the act regulating the practice in Justice's Court does not expressly mention the subject of certifying. (See *Marooney v. McKay*, 3 Or. 372.) The provisions of the law applicable are Code, p. 115, § 54; p. 463, § 7; p. 465, §§ 20-22. Now, the return on the summons does not show that a copy of the complaint certified by the justice of the peace before whom the cause was pending, or certified to by the plaintiff, his agent or attorney, was served on the defendant. This is a statutory requirement which must be observed before jurisdiction can be assumed or conferred. Whether it has been complied with or not, we must look to the return of the officer upon whom is imposed this duty. As the return of that officer does not show that a copy of the complaint, certified as required, was served, the service is insufficient to warrant a judgment by default against the defendant.

For this reason we are constrained to reverse the judgment of the court below, with directions to reverse and set aside the judgment of the Justice's Court.

Argument for Respondent.

[Filed April 25, 1887.]

N. H. MCKAY, RESPONDENT, v. N. A. MUSGROVE
AND W. H. MUSGROVE, APPELLANTS.

PLEADING—CONVERSION.—It is not necessary to allege in express terms in complaint for conversion of property that plaintiff is the owner of the property, provided that fact appears from the complaint conclusively, when the objection is not taken until after the verdict.

VALUE.—A pleading will not be deemed deficient, after verdict, which does not state the value of the property.

SAME.—The defendant could by motion have compelled the complainant to have made his complaint more definite and certain, and this course should have been pursued.

JUDICIAL NOTICE.—The court may take judicial notice that merchantable products, such as hay and potatoes, in Oregon have a value.

APPEAL from Multnomah County. Affirmed.

H. T. Bingham, and *A. R. Coleman*, for Appellants.

1. The complaint should have alleged ownership of the property. (*Johns v. O. S. N. Co.* 8 Or. 35; *Wright v. Field*, 64 How. Pr. 117; *Weiner v. Lee Shing*, 12 Or. 278.)

2. Plaintiff could not show the value of the property unless there was an allegation of value in the complaint. (1 *Sutherland on Damages*, pp. 173, 174.)

Moreland & Masters, for Respondent.

1. Where the action is for conversion, the law infers an injury measured by value of the property, and the injured party may recover under the general averment of damages. (1 *Sutherland on Damages*, 764.)

2. An averment of the value is not necessary in trover. (*Conross v. Meier*, 2 Smith, E. D. 34, 314; *Bacon's Abridgment*, tit. Tress.)

3. Every matter that would have been admissible by way of amendment is cured after verdict. (*Davidson v. O. & C. R. R. Co.* 11 Or. 136.)

The allegations of the complaint show ownership sufficient to sustain a verdict. (28 Am. Dec. 153; 1 *Addison on Torts*, [Wood's ed.] § 532; *Houghton v. Beck*, 9 Or. 327; *Davis v. Waters*, 11 Or. 448.)

THAYER, J.—This appeal is from a judgment recovered in favor of the respondent against the appellants for a conversion of certain hay and potatoes. The errors assigned are based upon an alleged defect of the complaint, consisting in a failure upon the part of the respondent to aver ownership in himself at the time of the conversion, and of the value of said articles. The substance of the complaint is as follows: That on the first day of October, 1885, the respondent leased of the appellants their farm for the term of twelve months from said date, and agreed to pay therefor the sum of one hundred dollars per month; that the respondent occupied the farm during the said term, during which time he planted a large amount of potatoes and harvested and cut and baled a large amount of hay, which was stored in the barn on the premises; that on the first day of October, 1886, the respondent surrendered up to appellants the premises, subject to his right to enter thereon, and to take therefrom the said hay and dig and remove the said potatoes; that there were in the ground on said premises eight hundred bushels of potatoes, and in the barn and on the premises eighteen tons of baled hay; that in addition to the said contract of leasing, the respondent leased of the appellants the barn to store the hay until he could remove the same therefrom, and paid them therefor hay of the value of fifteen dollars; that respondent was proceeding as rapidly as possible to remove said hay and to dig and remove the potatoes, when, on the thirteenth day of October, 1886, the appellants refused to allow the respondent to dig or remove said potatoes or to remove the said hay from said premises, and forbade him from removing anything from the place or from coming thereon; and that appellants were using said hay and potatoes and had converted them to their own use, by means whereof the respondent had been damaged in the full sum of \$570, for which he demanded judgment. An answer to the complaint was filed by appellants, controverting the allegations of conversion and damages, and the issues so made were tried by a jury, who returned a verdict in favor of the respondent for the sum of \$464.55. Thereupon the appellants' counsel filed a motion for judgment notwithstanding the verdict (formerly a motion in arrest of judgment), which

Opinion of the Court—Thayer, J.

motion the court denied. Said counsel insist that the complaint is defective in not alleging that the hay and potatoes belonged to the respondent at the time of the conversion, also in not alleging their value; and that their exception, which was made to the introduction of proof of their value upon the trial, was well taken.

Allegation of ownership. The allegations of the complaint are not direct, that the respondent was the owner of the articles alleged to have been converted, at the time of their conversion; but they show that he was such owner so conclusively that to have further stated the fact in direct terms would practically have been superfluous. Whether the complaint is open to objection or not upon that point by demurrer or motion is of no consequence if good after verdict, and that it is good after verdict there can be no question. And upon the point that it was objectionable in not containing any allegation of the value of the articles on demurrer, I am inclined very much to doubt.

Allegation of value. In the form given in 2 Chitty's Pleadings, page 836, for a declaration in trover, an averment of the value of the thing, "that the plaintiff was possessed as of his own property," is indicated as necessary, and in note "r" thereto it is said "that property must be described to be of some value," and a reference is made to B. & A., 271, as authority.

The averment, however, evidently was not required in order to apprise the defendant of the value of the property that would be claimed at the trial. Some of the cases cited by respondent's counsel herein show this to be so. *Conross v. Meier*, 2 Smith, E. D. is to that effect. It seems to me that the only object of such an averment is to show that the plaintiff has a general or special property in the thing converted, which he cannot have unless it have a value. If it were of such a nature that the court could not take judicial notice that it had any value, the averment might be essential, as a person could not have a property in something that was worthless. I can discover no other necessity for alleging that the property was of some stated value. The conversion is the gist of the action, and the value of the property is evidence of the amount of damages the plaintiff has

Points decided.

sustained. It is usual, however, to state the value in the complaint, and although the court may be authorized to take judicial notice that hay and potatoes in Oregon have a value, yet it would have been as well had the respondent alleged it. The complaint in this case is not a model pleading by a long way. It is very loosely drawn generally. The respondent's counsel should have alleged that he was the owner and entitled to the possession of certain hay and potatoes, describing them and stating their value, and that the appellants wrongfully converted them to their own use to his damage in a certain sum. That probably would have obviated this contention.

The appellants, however, could by motion have compelled him to make the complaint more definite and certain, and they should have done so instead of accepting it as sufficient, and then attempting to take advantage of a mere defect of statement of title by an appeal.

A pleading after verdict will not be deemed defective unless it lack a material allegation as defined by section 93 of the Code. This complaint is not defective to that extent under any view.

The judgment appealed from will therefore be affirmed.

[Filed April 25, 1887.]

S. M. BERRY, RESPONDENT, v. SOL. KING ET AL.,
APPELLANTS.

DECREE CANNOT BE COLLATERALLY ATTACKED.—In a suit to enjoin the enforcement of a decree creating a lien on certain land, which had been purchased by the plaintiff subsequent to the rendition of the decree from the judgment debtor; held, (1) That the decree could not be collaterally attacked unless it was absolutely void. (2) That the fact that the complaint upon which the decree was obtained, being for the foreclosure of a mortgage, did not set forth the consideration of the mortgage, was an irregularity which could have been objected to in the trial by the defendant, but did not invalidate the decree finally obtained.

STIPULATION.—It is immaterial that the appointment of a referee is unauthorized where the parties have stipulated that the testimony taken by him may be used in the trial of the cause.

APPEAL from Benton County. Reversed.

15 165
22 591
13* 772
30* 321

15 165
226 383
13* 772
38* 307

15 165
135 88
135 119

15 165
38 326

15 165
43 528

Opinion of the Court—Lord, C. J.

J. W. Rayburn, for Respondent.

The complaint did not allege facts sufficient to confer jurisdiction in the foreclosure suit. (*Moore v. Ellis*, 18 Mich. 77; *Damp v. Town of Dana*, 29 Wis. 419; *United States v. Arredonda*, 6 Peters, 709; *Fleishman v. Walker*, 91 Ill. 318; *Phipps v. Kelley*, 12 Or. 213.)

A judgment *coram non judice* is void.

John Kelsay, and *W. S. McFadden*, for Appellants.

A person not a party to a judgment or decree cannot proceed against it, if it did not at rendition affect his rights.

Having taken the land subject to a decree to which his grantor did not object, the grantee must abide by the lien. (*Freeman on Judgments* [3d ed.], §§ 118, 124, 130, 134, 512.)

The complaint states facts sufficient to constitute a cause of suit. (2 *Jones on Mortgages*, §§ 1452, 1465.)

LORD, C. J.—This was a suit in equity to enjoin the defendants from selling certain lands, now owned by the plaintiff, upon a certain execution issued for that purpose. Briefly, the facts are: That one C. S. Preston commenced a suit in March, 1881, to foreclose a mortgage upon certain lands described therein, executed by George M. Stroup and wife to secure the payment of a certain note to J. J. Whitney, which was duly assigned to him. After due and legal service, no appearance was entered by the defendant Stroup, and a decree by default was rendered, ordering the sale of the mortgaged property, and providing, in the event of a deficiency after such sale, for a personal judgment for the balance. This decree was duly docketed, and subsequently an execution was issued under which the mortgaged property was sold, but for an amount less than the amount due, which was credited, and no other payments have been made. At the time the decree was docketed, Stroup was the owner of certain other real property which by mesne conveyances the plaintiff Berry now owns, and against which property the execution sought to be enjoined was issued to sell for the payment of such

deficiency, at the instance of the defendant King, in the present suit, who claims to be the owner of said judgment by assignment. Substantially upon this state of facts the court found as a conclusion of law that the decree in the foreclosure suit was void, presumably, on the ground that the complaint in that suit did not state facts sufficient to constitute a cause of suit, and that the plaintiff was entitled to have the injunction made perpetual.

Decree cannot be attacked unless void. It will be noted that the plaintiff in this suit took the property subject to the lien of the judgment upon which the execution is now issued and which he seeks to enjoin. Having taken the land subject to a lien of which the grantor made no complaint, he is entitled to no indulgence; and, unless the decree is void—a nullity—the land in question should be subjected to its payment. The attack of the plaintiff, being collateral, and against a decree to which he was not a party, and which in no way affected his rights at its rendition, and with which his grantors were satisfied, he cannot impeach or avoid it, or enjoin an execution issued upon it, unless the decree is void for want of jurisdiction in the court which pronounced it.

Decree not void. The objection urged is that the complaint in the foreclosure suit does not set out the condition of the mortgage. The complaint was evidently drafted from one of Estee's forms, and with this exception, admittedly, contains all the general requisites of a complaint. (See 2 Estee's Pleadings, p. 138, form 558.) It alleges the execution and delivery of the note and mortgage, the names of the parties to them, the date and amount, when and where the mortgage was recorded, a description of the premises, the amount claimed to be due, the default upon which the right of suit has accrued, the assignment whereby the right of the plaintiff arises to maintain the suit, the terms of the note, and the execution of the mortgage for the purpose of securing its payment, an explicit statement of the relief sought; but it does not set out, as is usual, the conditions of the mortgage. Confessedly, the subject-matter was within the equity jurisdiction of the court; it had jurisdiction of the parties,

Opinion of the Court—Lord, C. J.

and the facts set up were sufficient to authorize the court to hear and determine them. It may be conceded, that if the objection now urged had been made by the defendants in that suit, the court would have refused to proceed, until the plaintiff obviated it; yet the failure to make it waived it, and authorized the court to proceed to final determination by decree which they cannot now question or impugn, much less the plaintiff in this collateral proceeding. In any event and in any view, no result, upon objection, could have defeated the right of the plaintiff to amend, and have his rights adjudicated under the mortgage. The defendants did not see fit to object, what right has the plaintiff in this proceeding to complain? No right of his has been abridged or impaired, or any fraud practiced upon him. In fact, it may be well doubted whether the allegation complained of is insufficient in the particular noted. However that may be, we are satisfied that the court had jurisdiction of the subject-matter and the parties, and that the decree is not void.

Appointment of receiver. It is claimed that the appointment of the referee by the judge at chambers, for the purpose of taking testimony concerning the assignment to the defendant King, was unauthorized by law, and that such evidence cannot be considered. It is admitted that without this evidence there is no proof of the assignment to the defendant King. Upon that statement of the case, an important question might be presented.

Stipulation. But the record discloses that at the ensuing March term the plaintiff obtained leave to file an amended complaint, and then and there it was mutually agreed that the findings of fact before made be considered as the facts upon the issues made by the amended complaint, and that the suit proceed to trial upon the report of the testimony made by the referee. In this view, it is immaterial whether the appointment was irregular or not; the parties have stipulated in court to proceed to trial upon the evidence reported by the referee, have argued their case, and submitted it to the court, and a decree has been rendered, and they, or either of them, cannot now avoid it. Without taking any evidence they might have stipulated the facts to be as reported, and proceeded to trial upon them. Upon

Argument for Appellants.

the whole, we find no error, except in the court's conclusion of law, and evidently this occurred from the pressure of business which deprived the learned judge of time for deliberation.

The decree must be reversed and the bill dismissed.

[Filed May 10, 1887.]

CROOK COUNTY, RESPONDENT, v. BUSHNELL ET AL.,
APPELLANTS.

15	189
28	405
28	409
28	573

COMPLAINT UPON AN OFFICIAL UNDERTAKING.—Under section 333 of the Code, before an action can be commenced upon an official bond or undertaking by any other person than the obligee named in the bond, leave of the court or judge thereof, where the action is triable, to commence the action, must be obtained, and a motion for a judgment of nonsuit should be allowed in the absence of such leave.

SAME—FACTS SUFFICIENTLY STATED.—Where the complaint shows that the defendant received money as treasurer, and failed to deliver the same to his successor in office, it is not necessary to allege that the money belonged to the county whose officer he was.

APPEAL from Crook County. Reversed.

Statement of facts: Action upon an official undertaking of Bushnell as county treasurer, made to the *State of Oregon*. Complaint alleges that the sum of money came into his hands as treasurer, and has not been turned over to his successor in office.

The complaint did not allege that leave had been obtained to bring the action, nor that the money was the property of the county.

Bennett & Wilson, for Appellants.

The county could not bring this action without having first obtained leave of the court. (Civ. Code, § 339.)

At common law, an action on an official bond could only be brought in the name of the obligee named therein. (*Inhabitants of North v. Elwell*, 4 Gray, 81; *Carmichael v. Moore*, 88 N. C. 39.)

W. R. Ellis, J. N. Duncan, S. A. Johns, and W. S. A. Johns, for Respondent.

Opinion of the Court—Lord, C. J.

As the county's right of action against defendant Bushnell does not rest on the undertaking, the motion for nonsuit was properly overruled. (*State v. Multnomah County*, 13 Or. 287; Code, p. 766, § 80.)

Appellants waived the question involved in their motions for nonsuit, as they did not stand on them, but are before the court upon the questions raised by demurrer. (Bigelow on Estoppel, p. 601; *Bates v. Ball*, 72 Ill. 108.)

LORD, C. J.—This is an action brought by Crook County, as plaintiff, against Bushnell, ex-county treasurer, and his bondsmen, as defendants, to recover the sum of ———, upon his official undertaking as such treasurer. The complaint alleges that the defendant Bushnell was duly elected treasurer of Crook County; that he executed a bond in the usual form to the State of Oregon; that the other defendants became sureties thereon; and that the sums of money for which the action is brought came into his hands as such treasurer, and have not been turned over to his successor in office. The complaint does not allege that the plaintiff had obtained leave of the court to bring the action, nor that the money sought to be recovered was the property of the county. The defendants demurred to the complaint and moved for a nonsuit, both of which were overruled, and the defendants refused to plead further, whereupon the court rendered judgment as prayed for in the complaint; and from this judgment the appeal is brought to this court.

Two questions are raised for our consideration and determination: 1st. Could the plaintiff (Crook County) bring this action under the statute without first having obtained leave of the court? and 2d. Was the complaint insufficient in not showing that the money sought to be recovered was the property of the county?

Leave to bring action must be had. It is provided by the Code that: "When a public officer, by official misconduct or neglect of duty, shall forfeit his official undertaking or other security, or render his sureties thereon liable upon such undertaking or other security, any person injured by such misconduct or neglect, who

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is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties, to recover the amount to which he may by reason thereof be entitled." (Code, § 338.) But it is further provided that: "Before an action can be commenced by a plaintiff other than the State, or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some person on his behalf showing the delinquency. But if the matters set forth in the affidavit be such that if true the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to a judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly." (§ 339.) At common law, an action could only be brought on a bond in the name of the obligee. As the State is the obligee in the bond in this action, there could not be, therefore, for the want of privity of contract between the parties, any action sustained upon the bond by the county or other party beneficially interested. The provisions of the sections cited are designed to modify this rule of the common law, and to enable others than the State or body politic named as obligee to maintain an action in their own name. In our State as in other States, official bonds prescribed by statute, executed by persons holding places of public trust, and made payable to the State or other body politic, are intended not only to secure public interests, but to redress private wrongs. This is manifest from the provisions of section 338, *supra*, which evidently contemplates these two classes, one where the bond is taken to secure the rights of the State or public interests, and the other, to protect the rights of individuals. But section 339 prescribes the conditions on which a party other than the State or body politic named in the bond as obligee may maintain an action in his own name. In

Points decided.

effect, it provides that before an action can be commenced by a plaintiff other than the State, or the body politic named in the security or bond as obligee, leave must be obtained of the court, or the judge thereof, where the action is triable, and the proof to be submitted before such leave shall be granted, and the judgment of nonsuit to which the defendant is entitled, when it does not appear from the complaint that such leave has been granted. The State is the only obligee named in the bond. The bond is made payable to it, and no action can be maintained upon it by another party beneficially interested, except leave be granted as provided, and this be alleged in the complaint. Whoever, therefore, other than the State, when a breach of the bond is committed by its principal obligor, undertakes to maintain an action in his or its own name, without such leave granted and alleged, may be nonsuited on motion of the defendant. Crook County, although a body politic, is a plaintiff in this action, not named as an obligee in the bond. It is a plaintiff, then, other than the obligee named, the State of Oregon, and must, before an action can be commenced or maintained, as a plaintiff in its own name on the bond, obtain such leave, and allege the same in its complaint. Not having done so, the motion for a judgment of nonsuit should have been allowed. As to the second point, we think the facts alleged are sufficient to sustain the action.

The judgment must be reversed and the cause remanded for further proceedings.

[Filed May 10, 1887.]

AURA M. RALEY AND OLIVE I. JOHNS, APPELLANTS, v. UMATILLA COUNTY, RESPONDENT.

COUNTIES—POWER TO TAKE REAL PROPERTY.—By general statute, "each county has power to purchase and hold for the use of the county lands lying within its own limits." *Held*, that under this statute the county of Umatilla had the capacity to take and acquire the legal title to the premises in controversy.

COUNTY'S CAPACITY TO TAKE CANNOT BE ATTACKED BY GRANTOR OR HIS HEIRS.—By the delivery of the deed to the county, the grantor divested himself of title. Whether by taking such title the county violated or abused its powers does not concern the grantor or his heirs. If raised at all, that question must be made by the State, and not by a private party.

15 172
16 81
16 469
20 273
13* 890
17* 582
19* 82
26* 722

Opinion of the Court—Strahan, J.

CONDITION SUBSEQUENT—DEFINED.—To create a condition subsequent in a deed, apt words are necessary, such as "on condition," "provided always," "if it shall so happen," and the like.

CASE IN JUDGMENT.—A deed to the defendant made by Aura M. and her former husband, which contained the following clause: "The parties of the first part covenant to and with the party of the second part, that they will warrant and defend the same against all claims whatsoever to the use and benefit of the parties of the second part, for the special use *and none other* of educational purposes, and upon which block shall be erected a college or institution of learning free from all sectional or political influences;" *held*, not to create an estate upon condition subsequent.

REMEDY IN CASE OF CONDITION BROKEN.—If a condition subsequent be broken, the party entitled may re-enter, and if necessary, regain his estate by action, but equity will not aid him.

TRUST, UNCERTAINTY OF BENEFICIARIES IN CASE OF CHARITABLE.—In case of a public charitable trust, it is not necessary to its validity that the beneficiaries should be known. It is the use to which the property is to be applied and not the particular persons to be benefited which the law regards.

PUBLIC CHARITABLE TRUSTS.—Such trusts are generally favored and liberally construed by the courts.

APPEAL from Umatilla County.

Robt. J. Slatar, and Ramsey & Bingham, for Appellants.

Cox & Minor, and Cox, Smith & Teal, for Respondent.

STRAHAN, J.—The object of this suit is to quiet plaintiffs' title to "College Block," being block No. 12, in the town of Pendleton, Umatilla County, Oregon. The defendant demurred to the plaintiffs' amended complaint, and to each of the alleged causes of suit therein, which demurrer was sustained by the court and the suit dismissed, from which decree this appeal is taken.

The plaintiffs state the interest which they claim in said real property, and then allege the defendant's title, so that on the complaint the main facts relied upon by the respective parties are before us. It appears from the complaint that on and prior to the fifth day of December, 1868, Moses E. Goodwin was the owner in fee of the real property in controversy, and on that date he, with the plaintiff Aura M. Rayley, who was then his wife, executed and delivered to the defendant a deed, whereby, in consideration of one dollar to them in hand paid by the party of the second part, the receipt of which sum was thereby

Opinion of the Court—Strahan, J.

acknowledged, they granted, bargained, sold, and delivered unto the said party of the second part, said Umatilla County, the real property in controversy. The *habendum* clause of said deed is as follows: "To have and to hold the said block of ground with all the appurtenances thereunto belonging unto the said party of the second part forever; and said parties of the first part do hereby covenant and agree with said party of the second part that they are the true owners of said premises in fee-simple, at the ensembling of these presents, and that they will warrant and defend the same against all claims whatsoever to the use and benefit of the parties of the second part, for the special use, and none other, of educational purposes, and upon which block shall be erected a college or institution of learning free from all sectional or political influence."

It further appears from the complaint that the plaintiffs have succeeded to all the estate or interest of said Moses E. Goodwin in said property, if any, by inheritance, three fourths thereof to said Olive L. and one fourth to said Aura M., and said Aura M. also claims dower in said property. It also appears from the complaint that before the commencement of this suit, the plaintiffs entered into the possession of said property as for condition broken, and are now in the possession thereof.

1. *Power of counties to hold land.* Upon the argument, appellants' counsel insisted that Umatilla County had no power or capacity to take title to the property in controversy, or to receive said deed; and that therefore plaintiffs' title was unaffected by reason of the attempted execution and delivery of the same. This is the first question demanding our attention, for the reason that if this objection is well taken it renders the consideration of others unnecessary. By the statute of this State relating to the corporate power and capacity of the several counties therein it is provided: "That each county shall continue to be a body politic and corporate for the following purposes, to wit, to sue and be sued; to purchase and hold for the use of the county lands lying within its own limits, and any personal estate; to make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county." (Gen. Laws, 535,

§ 1.) Also by sections 346 and 347 *counties* are classed as *public corporations*. They are public, for the reason they are designed as agencies in the administration of civil government, and they possess and can exercise such powers as have been conferred upon them by the legislature and none others. By the terms of the section above quoted a county may purchase and hold *for the use of the county* lands lying within its own limits. Counsel for the appellants claim that the term "for the use of the county" is to be taken as a limitation upon the power of the county to take, and that therefore, unless it plainly appears that the deed is taken for some purpose or object which the legislature had previously pointed out or authorized by some act, the grant is a nullity and confers no title. I doubt the correctness of this construction. It is harsh, and in many instances, if rigidly applied, might tend to defeat the very object of the legislature in the creation of such corporations. While the subject is not entirely free from difficulty, and it is conceded there is a conflict of authorities on the subject, still the later and better view is that both counties and cities may take land by purchase, gift, or devise under charters and statutes of the same legal import as our own. *Chambers v. City of St. Louis*, 29 Mo. 543, fully sustains such a conveyance. Under the statute of that State all corporations had power "to hold, purchase, and convey such real estate as *the purposes of the corporation shall require*, not exceeding the amount limited in its charter." It was further provided in said act that "no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given." By the charter of the city of St. Louis the city was authorized to "purchase, receive, and hold property, real and personal, within said city, and may sell, lease, or dispose of the same *for the benefit of the city*; and may purchase, receive, and hold property, real and personal, beyond the limits of the city, *to be used for the burial of the dead of the city*; also for the erection of water-works to supply the city with water, and also for the establishment of a hospital for the reception of persons infected with contagious and other diseases; also for poor-house, work-house, or house of correction, and may

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sell, lease, or dispose of such property *for the benefit of the city.*" The statute was silent on the subject of devises. Under these provisions of the charter Bryan Mullanphy made his will, whereby he bequeathed "one equal undivided one third of all my property, real, personal, and mixed, I leave to the city of St. Louis, in the State of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the West." Much of the real property bequeathed was beyond the limits of the city, and it was not claimed that it was intended or could be used for any of the purposes contemplated by the charter; but the title of the city under the will was sustained. The court said: "There being a right in the city to purchase, if there is a capacity in the vendor to convey, so soon as the conveyance is made, there is a complete sale; and if the corporation in purchasing violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the State and the city. The law is only directory in relation to a corporation taking lands. It imposes no penalty, nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. The city is duly incorporated with authority to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require; and if, in holding and purchasing real estate, she passes the exact line of her power, it belongs to the government of the State to exact a forfeiture of her charter, and it is not for the courts, in a collateral way, to determine the question of misuser by declaring void conveyances made in good faith. In this view of the subject we are fully sustained by the authorities." (*Baird v. Bank of Washington*, 11 Serg. & R. 418; *The Banks v. Poiteaux*, 3 Rand. 136; *Leasure v. Hillegas*, 7 Serg. & R. 319; Angell on Corporations, § 152; *Silver Lake Bank v. North*, 4 Johns. Ch. 370.)

And the same case fully sustains the power of the city to execute the trust created by the will. So in *Craig v. Secrist*, 54 Ind. 419, it was held that a county had the legal capacity to take a devise of the property of a testator as a permanent fund, the income of which was to be used in educating a specified class of

the children of such county. In disposing of this branch of the case the court said: "It is further insisted by appellants' counsel that the will in this case is void, for the reason that the trustee named therein is incapable in law to accept the trust created in and by said will. It is provided by the fifth section of the act under which the devisee in this will may be said to be incorporated, that such corporations 'may prosecute and defend suits, and have all the duties, rights, and powers incident to corporations, not inconsistent with the provisions of this act.' (1 Rev. Stats. 1876, p. 356.) In 1 Perry on Trusts, page 30, section 42, it is said: 'That at the present day, corporations of every description may take and hold estates as trustees for purposes not foreign to their own existence.' And in section 43, the same writer says: 'But if the trusts are within the general scope of the purposes of the institution or the corporation, or if they are collateral to its general purposes, but germane to them, as if the trust relates to matters which will promote and aid the general purposes of the corporation, it may take and hold and be compelled to execute them if it accepts them. Thus, towns, cities, and parishes may take and hold property in trust for the establishment of colleges, for the purpose of educating the poor, . . . and for the support of schools.' The text of this writer is abundantly supported by the authorities he cites. Certainly, the purposes of the trust created by the will now being considered, are not foreign to nor inconsistent with the general purposes for which the devisee named in said will was created a corporation. Rather, it seems to us, will the trust in said will, considered in its relation to the objects of said trust, promote and aid the general purposes of said corporation. In our opinion, therefore, the devisee named in said will, the county of Owen in its corporate capacity, is capable of holding as trustee the estate devised to it in and by said will." In addition to the authorities already noticed, the following cases also sustain the authority of a public corporation to take and hold the title to real property, especially where it is in furtherance of some public trust or duty: *McDonough v. McDonough*, 15 How. 367; *Vidal v. Gerard's Ex'rs*, 2 How. 127; *Bell County v. Alexander*, 22 Tex.

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350; *Coggeshall v. Pelton*, 7 Johns. Ch. 292. But aside from these authorities, the case of *Brown v. Brown*, 7 Or. 285, it seems to me, fully sustains the power of a public corporation in this State to take and hold property in trust for a charitable or public purpose. By his last will Cyrus Olney disposed of his property as follows:—

“1. I bequeath and devise all my personal property and real estate that is capable of being disposed of by will to Jackson G. Hastler and Henry S. Aiken, in trust, first, to pay all my debts; and second, to hold the rest due in perpetuity for the benefit of the town of Astoria, in the county of Clatsop, and State of Oregon.”

In sustaining this bequest the court said: “At the time the will was made, the charter of the town of Astoria gave it authority to ‘purchase, hold, and receive property, real and personal, within said town for public buildings, school purposes, and town improvements.’ Also, to purchase, receive, and hold property within and beyond the limits of the town, to be used for burial purposes, and for the reception of persons affected with contagious diseases, and for work-houses and houses of correction, and for the construction of water-works to supply the town with fresh water; and to lease, sell, and dispose of the same for the benefit of the town. . . . If the devise had been made directly to the town of Astoria, we think it would have been valid in law. It was equally so when devised to Hastler and Aiken in trust for the benefit of the town.” And Judge Dillon gives the sanction of his name to this view of the subject. He says (2 Dillon on Municipal Corporations, § 566): “Thus a conveyance of land to a town or other public corporation for benevolent or public purposes, as for a site for a school-house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object named.” But if the premise contended for by the appellants were conceded, the conclusion which they seek to draw from it would not follow. The statute plainly confers upon counties the power to acquire and hold real property for certain purposes, and the appellants’ contention is that this deed conveys property to the county outside of and for other and different purposes than those specified in the

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statute. This is a question which these plaintiffs cannot be permitted to raise, and in which they have no interest. That could only be done at the instance of the State. (2 Dillon on Municipal Corporations, § 574; *Trustees of Davidson College v. Executors of Maxwell Chambers*, 3 Jones Eq. 253; *Goudie v. N. W. Co.* 7 Pa. St. 253; *Land v. Coffman*, 50 Mo. 243.)

2. *Condition in a grant.* But conceding that the deed in question passed title to the land in controversy to defendant, appellants' counsel insist that it was an estate upon a condition subsequent, and that the condition not having been performed, the estate terminated upon re-entry. The determination of this question, therefore, becomes necessary. The defendant may have acquired title by the deed, or the appellants may be precluded from claiming that defendant had not legal capacity to take the land for the particular purposes specified in the deed, still, if the estate was upon a condition subsequent, and that condition has not been performed, the plaintiffs might lawfully re-enter and repossess themselves of the estate granted, and thus terminate the estate of the grantee.

An estate upon condition is "one which is made to vest, to be enlarged or defeated upon the happening or not happening of some event." (Tiedman on Real Property, §§ 271, 272; Washburn on Real Property, p. 2.) "The condition which is to affect the estate may be express or implied, and it may be precedent or subsequent. An express condition, otherwise called a condition in deed, is one declared in terms in the deed or instrument by which the estate is created. An implied, or a condition in law, is one which the law implies either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances. Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as when they do happen defeat the estate." (2 Washburn on Real Property, p. 3, § 2.)

To create a condition in a grant, apt and appropriate words ought to be used, such as "on condition," "provided always," "if it shall so happen," or "so that the grantee pay, etc., within

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a specified time," and the like. Therefore, "the grant of a lot of land to set a meeting-house thereon does not imply a condition. And an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture. And yet these words may create a condition *if a right of re-entry is reserved* in favor of the grantor in case of failure to carry out the intention thus expressed." (2 Washburn on Real Property, pp. 4, 5.)

In *Taylor v. Binford*, 37 Ohio St. 262, a conveyance for the use of school purposes *only* was held not to create a condition. So in *Carter v. Branson*, 79 Ind. 14, the words in the *habendum* clause of the deed, "to have and hold for the use of said religious society of friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," did not create a condition subsequent. And the like doctrine is very clearly announced in *First Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Company*, 103 Pa. St. 608. So, also, in *Packard v. Ames*, 16 Gray, 327. "A deed of land to a number of persons incorporated as a religious society, *habendum* to them and their heirs and assigns, and to each and every person who may hereafter become lawful owners and proprietors of a pew in a meeting-house *to be built* and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors, to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting-house, to be built and rebuilt on the said lot of land forever, without any clause providing for forfeiture or re-entry, is not a grant upon condition that a meeting-house shall be erected and maintained on the land conveyed." So a grant of land upon a valuable consideration, upon trust that the trustee "shall at all times permit all white religious societies of Christians, and the members of such societies, to use the land as a common burying-

ground, and for no other purpose, was not upon condition subsequent." (*Brown v. Caldwell*, 23 W. Va. 187.) Neither is a grant of land which has been used as a burying-place to a town "for a burying-place forever," in consideration of love and affection, "and divers other valuable considerations," a grant upon condition subsequent. And the like doctrine is announced in *Thornton v. Trammell*, 39 Ga. 202; *Bisley v. McNeice*, 71 Ind. 434; *Ayer v. Emery*, 14 Allen, 67. Our conclusions on this point are strengthened by the fact that the appellants are invoking a technical rule of the common law, which rule has never been favored by the courts, but is always construed strictly. (*Emerson v. Simpson*, 43 N. H. 475; *Woodworth v. Payne*, 74 N. Y. 196; *Page v. Palmer*, 48 N. H. 385; *Godberry v. Shepherd*, 27 Miss. 203.)

3. *Remedy for breach of condition.* The counsel for appellants upon the argument claimed that the defendant was bound by the terms of the deed, in order to save the land conveyed from forfeiture, to erect thereon "a college or institution of learning free from all sectional or political influence"; and that, inasmuch as there is no law authorizing said county to apply any of the funds under its control to such a purpose, the grant was necessarily defeated. Conceding now that the words in the *habendum* clause of the deed created a condition subsequent, the conclusion which counsel drew from the fact, it seems to me, does not follow. In such case numerous authorities hold that if the condition is impossible to be performed, or illegal, it is void, and the grantee would take the estate freed from the condition. (*Taylor v. Sutton*, 15 Ga. 103; 2 Washburn on Real Property, p. 8, § 6.) But it is not now necessary to decide that question. It has thus far been assumed that equity had jurisdiction in this case. This assumption has been allowed only at the request of counsel mutually made upon the argument; but the remedy of the plaintiffs was at law upon their theory of the case. If condition subsequent be broken, the party entitled may re-enter, and if necessary have an action to regain his estate, but equity would not entertain jurisdiction for such purposes. The other matters pleaded in the complaint, whereby it is sought to present a case of equitable

Petition for Rehearing—Strahan, J.

cognizance, are wholly insufficient for that purpose, and do not require special notice.

Let the decree appealed from be affirmed.

On petition for rehearing.

STRAHAN, J.—Appellants' counsel have filed a petition for a rehearing in which it is insisted that the land in controversy was granted for educational purposes and for none other. This is conceded; the deed expresses that upon its face; but it is nowhere alleged that it is being used for any other purpose, and if it were being so used it is probable that the heirs of the grantor have such an interest that they might restrain such unauthorized use of the thing granted. But of this they do not complain. It is the non-user for which they demand a forfeiture. The deed does not fix any time when the land granted must be so used, nor is the estate limited as to the time when its use shall begin. The grantors, when they made the deed, were chargeable with full notice of all the powers and authority of Umatilla County under the statute. Not having annexed any conditions to the grant at the time it was made, the court ought not to undertake to supply them by implication. It is also urged by counsel for appellants, with much apparent confidence, that this trust is void because those who may be its beneficiaries are uncertain or unknown. But this does not belong to that class of trusts where it is necessary they should be known. It is the use to which the property is to be applied and not the persons benefited which the law regards in such case. In other words, it is a trust for charitable uses. (2 Perry on Trusts, § 700.) "If in a gift for private benefit, the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and revert to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain or indefinite. Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recip-

Argument for Appellant.

ient begins. (2 Perry on Trusts, § 687.) Trusts of this character have been generally favored and liberally construed by the courts. Such benefactors will not be defeated or overthrown on slight or trivial grounds.

The petition for a rehearing will be overruled.

[Filed May 11, 1887.]

SAMUEL R. BAISLEY, RESPONDENT, v. JEREMIAH C. BAISLEY, APPELLANT.

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133	151

COURTS. — During a regular term of the Circuit Court of the State of Oregon for Baker County, the district judge, Leon, presiding, and conducting a trial with a jury drawn from the regular panel, a jury was drawn by Judge Bird of the Seventh Judicial District, and a trial of this cause had at a place other than the court-house.

SAME. — Defendant appeared, and without objecting to the jurisdiction of the court asked for a continuance, which was granted; upon re-appearance the defendant objected to the further proceeding. A jury was impaneled and a trial had. *Held*, (1) That there was no authority for holding more than one Circuit Court at the same time in the same county. (2) That the judgment should be reversed, as it appears that the trial was not had at the place designated by law, and it does not appear that the place where it was had, had been properly selected or designated. And appellant had no opportunity for defense.

APPEAL from Baker County. Reversed

Olmstead & Anderson, for Appellant.

Unless a disqualification of the regular judge of the district exists another judge cannot be substituted. (Act, 1880, p. 48; *State v. Roberts*, 8 Nev. 24; *People v. O'Neil*, 47 Cal. 109.)

This statute does not authorize the holding of a separate and distinct department of the Circuit Court. The power of substitution must be strictly construed. (*Clays v. State*, 24 Wis. 462.)

Consent of the parties cannot confer jurisdiction. (Freeman on Judgments, § 119; *Dix v. Hatch*, 10 Iowa, 380.)

Mr. Zera Snow appeared for the Respondent, and made an oral argument.

THAYER, J.—The respondent commenced an action against the appellant in the Circuit Court for Baker County upon a promissory note executed by the latter to the former.

The appellant filed an answer, in which he alleged that the only consideration for the note was the sale of an undivided three-eighths interest in a certain quartz-mining claim; and that at the time of making the note, the respondent agreed to convey the said interest in the claim to him immediately, on the same day the note was executed; that the respondent did not so convey the same on the day the note was executed, nor had since conveyed it, or any part thereof. The respondent filed a reply to the new matter contained in the answer controverting the same. It appears from a copy of the record transmitted to this court, that the case was continued on June 26, 1886, for the term then in session; and that on the twelfth day of October, 1886, the appellant filed a motion and affidavit for a continuance of the case for the term then in session. The respondent opposed the motion, and the parties seem to have terminated the matter by a mutual consent in open court that the cause be set for trial for the third day of January, 1887, before Judge Bird, judge of the Seventh Judicial District. Facts set forth in the affidavit for the continuance disclosed that the regular judge of the district, Judge Ison, was disqualified to preside in the case, and that circumstance, doubtless, had an influence in inducing the consent referred to. The next proceeding in the case is shown by a journal entry of the 13th of January, 1887, which is as follows: "This cause coming on to be heard before Hon. J. H. Bird, judge of the Seventh Judicial District of this State, he presiding at the request of Hon. L. B. Ison, judge of the Sixth Judicial District, and on Thursday morning, January 13, 1887, the said Judge Bird opened court in a building near the county courthouse in Baker City, and at this time the defendant's attorneys, Olmstead and Anderson, appeared, and without any objection to the jurisdiction of this court, or the place of holding the court, requested the court to postpone this cause until the afternoon of this day, on account of the absence of the defendant, and then stated that if defendant did not appear they would withdraw

from this cause. Thereupon, the impaneling of the jury was postponed until the afternoon at 1:30 o'clock P. M., and at the coming in of the court, in the afternoon, the attorneys for defendant filed their affidavit of M. L. Olmstead, one of the attorneys for defendant, and also filed his objections to the jurisdiction of the court."

The affidavit was to the effect that the Circuit Court was in session with Luther B. Ison, presiding; that defendant had no knowledge or information, as affiant believed, that the cause would be called for trial while the said court was at the same time engaged in the trial of the *State of Oregon v. Israel and Thorndyke*; that the defendant was absent without the affiant's knowledge or consent; that he had diligently endeavored to notify the defendant that he was required to appear at that time, but had been unable to receive any communication from him; that affiant could not proceed to trial without the attendance of the defendant.

The objections to the jurisdiction were upon the grounds:—

1. That said court had no jurisdiction of the subject-matter of the cause, nor of the parties litigant. The said court being then in adjourned session with Luther B. Ison, the regular qualified and acting judge of the Sixth Judicial District of the Circuit Court of the State of Oregon, then in session, and having on trial a criminal cause, with a jury impaneled, and a jury drawn from the panel of said court, and then in the jury-box in the trial of said criminal cause, and this cause being called for trial before Judge Bird, of the Seventh Judicial District of the Circuit Court of the State of Oregon, at a place other than the court-house and regular place of holding said court.

2. For the reason that there was no legally constituted court then in session for the trial of the cause, nor a legally constituted jury in attendance from which to call jurors to try the cause.

Appended to the said objections is the following:—

"The foregoing exceptions are settled, approved, and signed, and hereby made a part of the record of this court, this thirteenth day of January, A. D. 1887, at one o'clock and thirty minutes P. M.

J. H. BIRD, Judge."

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From other journal entries in the case it appears that the said court proceeded to draw a jury; that the case was presented to them, and they returned a verdict for the respondent for \$3,999.17, upon which the judgment appealed from was entered.

The grounds of error upon which this appeal is founded are: That the judgment was not rendered by any court known to the law; that the regular court for the county was in session and presided over by Judge Ison at the court-house, when the trial in this case took place; and that but one Circuit Court could be in session at the same time, prior to the late amendment providing for another department of the Circuit Court in said Sixth Judicial District. The point raised by the appellant's counsel, in view of the facts claimed by him, presents a difficult question to get over. I am fully satisfied that, under the act of the legislative assembly of 1880, there could be only one session of the Circuit Court for the county of Baker at the same time. Judge Ison had authority, when disqualified from holding the term, or from trying a particular case, or when unable to be at the court, to call in any of the other circuit judges of the State to preside in his place; but that the judge of another Circuit Court could hold a court, draw a jury from the regular panel, and try a case while the judge of the district was in the full exercise of his judicial functions, in the manner claimed, could not possibly be legal; no such authority as that is contained in the Act of 1880, before referred to. The respondent's counsel, however, claims that there is nothing before this court from which it can be ascertained that Judge Ison, at the time this case was tried, was holding said Circuit Court, engaged in the trial of the criminal case referred to in the objections to Judge Bird's jurisdiction. I was at first inclined to adopt this view; but upon a full consideration of the question with my associates, have concluded that the journal entries and the exceptions "settled, approved, and signed by Judge Bird," as before mentioned, are sufficient to establish the fact as claimed; besides, it clearly appears from the journal entry referred to that the court presided over by Judge Bird did not sit at the place designated by law, as provided by section 901 of the Civil Code, and it no-

Points decided.

where appears that the place where it was held had been properly selected or designated. The appellant evidently has not had the opportunity to make his defense to the action that the law entitles him to.

The judgment must therefore be reversed, and the cause remanded for a new trial.

[Filed May 17, 1887.]

STATE OF OREGON, RESPONDENT, v. ILLIS ROBERTS,
APPELLANT.

EVIDENCE—ADMISSIBILITY OF—WHEN FACTS CONSTITUTED PART OF THE CRIMINAL ACT, THOUGH THEY MAY EVEN TEND TO PROVE ANOTHER CRIME.—The evidence offered tended to prove that the powder and fuse used to burn the barn were obtained from the powder-house of a third person. *Held*, that it was competent to prove all the facts, though in doing so the evidence offered tended to prove another crime; but that in this particular case the evidence offered did not necessarily tend to prove another crime.

CONSPIRACY—ACTS AND DECLARATIONS OF CONSPIRATORS.—After proof of a conspiracy, or agreement to commit a crime, all that was said or done by any of the conspirators in furtherance of the unlawful purpose may be introduced in evidence upon the trial of all or either of them.

INSTRUCTIONS BY THE COURT—PROVINCE OF THE JURY.—The court did not err in refusing to tell the jury that proof by the defendant of one single fact by a preponderance of the evidence, inconsistent with the defendant's guilt, is sufficient to raise a reasonable doubt, and the jury should acquit the defendant. In such case, it is the province of the jury to determine the effect of the evidence, and this right cannot be influenced or controlled by the court.

REASONABLE DOUBT—DEFINITION OF.—The court defined a reasonable doubt as follows: "A reasonable doubt is not every doubt; it is not a captious doubt. It is such a condition of mind resulting from the consideration of the evidence before you as makes it impossible for you, as reasonable men, to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory." *Held*, not error.

REFUSAL TO CHARGE—WHEN NOT ERROR.—The instruction asked by the defendant on the subject of reasonable doubt contained a correct statement of the law, and ought to have been given; but inasmuch as the ground was fully covered by the instruction given by the court on its own motion, on the same subject, *held*, that the error did not prejudice the defendant.

ACCOMPLICE—WHO IS NOT.—A person who did not counsel, aid, or abet, or in any manner participate in the commission of a crime, and whose only knowledge of the facts was derived from what she saw and heard at her husband's house, who was one of the parties implicated, is not an accomplice.

15 187
17 360
18 362
13* 896
21* 133
23* 252

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43* 224

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DEFENDANT'S INTENT—INSTRUCTION.—The indictment charged the defendant with having wilfully, maliciously, and unlawfully set fire to and burned W. S. L.'s barn. The defendant asked the court to tell the jury that if defendant set fire to a hay-stack near the barn with a malicious, wilful, and unlawful intent, and by that means the barn was burned, that he must be acquitted. This the court refused; *held*, not error. It was the province of the jury to say with what intent the hay-stack was fired, and if it was fired as a means or with the intent to burn the barn, the defendant's guilt would be the same as if he had actually applied the torch to the barn.

NEW TRIAL—REFUSAL TO GRANT, NOT REVIEWABLE.—Under the Code of Criminal Procedure the refusal of the trial court to grant a new trial is not reviewable on appeal.

APPEAL from Multnomah County.

John Burnett, and *A. Lenhart*, for Appellant.

N. D. Simon, for Respondent.

STRAHAN, J.—On the fifteenth day of February, 1887, the grand jury of Multnomah County returned into the Circuit Court of that county an indictment against the defendant, charging him with the crime of arson. The charging part of said indictment is as follows:—

“The said Illis Roberts, on the thirtieth day of July, A. D. 1886, in the county of Multnomah, and State of Oregon, did wilfully, maliciously, unlawfully, and feloniously set fire to and burn in the night-time a barn of another, namely, the barn of W. S. Ladd, situated in the county of Multnomah, and State of Oregon, with intent to injure thereby the said W. S. Ladd.”

The testimony offered upon the trial tended to prove that the defendant and Robert A. Burnys and Charles Gale conspired together in the month of July, 1886, for the purpose of burning this barn. Their reason for doing so was, as stated by the defendant Roberts, that “Ladd had no business to hire Chinamen.” Burnys pleaded guilty to an indictment for the same offense, and was sentenced to imprisonment for five years. This defendant, after a trial before a jury, was found guilty and sentenced to be punished by imprisonment for six years, from which judgment he has appealed to this court.

This case is one of considerable importance, and the rulings of the court below cannot be properly understood without a pretty

full statement of the evidence given upon the trial. Mrs. Almira Burnys was the first witness on the part of the State, and she testified as follows: "My name is Almira Burnys. I am the wife of Robert Burnys, and we lived on the section line road when the barn was burned. Roberts came to our house, and I heard him and Mr. Burnys talking about burning the barn. I knew two or three weeks before the barn was burned that they were going to burn it, and I told Mr. Burnys not to burn it. They went once, about two weeks before the barn was burned, to burn it, but didn't. The night before it was burned Roberts met Mr. Burnys at our house and said Gale was coming; but he didn't come, so they didn't do anything. The next day Roberts came to the house in the afternoon and said Gale would meet them at the lodge. They talked about burning the barn and I overheard them; they were in the front room while they were talking and I was in the kitchen. There is only a board partition between the rooms, and I could hear every word they said and see them through the cracks. They went away about seven o'clock; Mr. Burnys took some powder and fuse and I knew they were going to burn the barn. I don't think they thought I knew anything about it. It was not light at this time, and yet it was not dark. I saw them when they left. They went to the lodge and after it was out Mr. Burnys, Roberts, and Gale went to the barn."

"Question by defendant. How do you know they went to the barn?

"Answer. Mr. Burnys told me so when he came home, and all the knowledge I have is from conversations overheard by me between Burnys and Roberts.

"Q. Was Mr. Roberts present during the conversation?

"A. Yes, sir. Mr. Burnys told me that he and Roberts and Gale set it on fire with powder. I was watching the fire when he came home. The roof hadn't caught fire yet when he reached the house. He had his hat and coat and shoes off when he came in and had been running. He said he took off his shoes so no one could hear him come up the steps. I said, 'Robert, what did you burn that barn for?' and he said, 'You keep still; if

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you ever say a word about it I will kill you.' Afterwards, I asked Roberts, 'What made you burn that barn?' and he said, 'That's all right, Ladd had no business to hire Chinamen.'"

"Question by District Attorney. Do you know where this powder that was used to burn the barn came from?"

"Answer. It came from Beck's powder-house.

"Q. Do you know when it came from there?"

"A. Yes, about a month before the fire.

"Q. Who brought it from Beck's powder-house?"

"A. Mr. Burnys and Roberts.

"Q. What did they do with it?"

"A. They buried it.

"Q. Where did they bury it?"

"A. Under the house.

"Q. Do you know how much powder they took?"

"A. They took two twenty-five-pound cans and several small ones.

"Q. Do you know what else they took?"

"A. Yes, they got fuse.

"Q. Do you know where they got the fuse?"

"A. Yes, from Beck's powder-house.

"Q. How much powder and stuff did they bury?"

"A. All of it. Thetwenty-five-pound cans and thesmall ones.

"Q. Do you know where the twenty-five-pound can is now?"

"A. Yes, I've got a plant in it.

"Q. Do you know where the powder is now?"

"A. I showed it to the detectives, and they took it away."

On cross-examination the witness testified: "The first person I told about the burning of the barn was Mr. Ladd. He gave me ten dollars; that is all the money I have received from him; I told him about it about four weeks ago; it was just after Mr. Burnys and I had had a quarrel; the trouble was about my children; he put me out of doors, and I went with it, and I have not lived with him since; Mr. Arthur Kelly carried a letter from me to Mr. W. M. Ladd, which he opened and read; I told Mr. Ladd that I did not want to go to my grave with that secret in my possession without disclosing it."

Barry, a witness for the State, testified that he went to Burnys' house and searched the premises.

"Question. Did you find any powder?

"Answer. Yes.

"Q. What powder did you find?

"A. This twenty-five-pound can, and those small cans and fire-works." (The cans of powder were then offered in evidence.)

Charles Gale, also a witness on the part of the State, testified substantially as follows: "My name is Charles Gale; I live in East Portland; I have lived there about fifteen months; we burned the barn July 30, 1886; Burnys and Roberts and myself were present; Roberts planned the burning of the barn; I said to him when he first began talking about it, 'what's the use, it's fully insured, and Ladd won't lose anything.' He said he would find out whether it was insured or not, and some time afterwards told me that it was not insured to amount to anything; after the lodge was over we three went together from the lodge and burned the barn; we climbed the fence and went through the field towards the barn; when we got nearly there I stopped; they told me to stay and watch; they went around on the east side of the barn, where there was a stack of hay; Roberts split the fuse so it could be lighted, and put the can of powder in the hay, and Burnys touched the match."

"Question. Do you know where that powder came from?

"Answer. Yes, it come from Beck's powder-house; I was not present when the powder was obtained, but Roberts and Burnys both told me that they got the powder there.

"Q. Do you belong to the secret lodge of I. W. A.?

"A. Yes.

"Q. What principles do they advocate?

"A. The opposite of the Knights of Labor.

"Q. Did Mr. Roberts tell you anything about Mrs. Burnys; how he would keep her secret?

"A. He said he would make her join the lodge and she would not dare to tell.

"Q. What are the principles of the I. W. A.'s?

"A. They are somewhat like the anarchists.

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"Q. Is it not a fundamental principle that they will perjure themselves or do anything to help a member out, and is it not a fact that they threaten death to any one who divulges any of its secrets?

"A. Yes, that is what they will do."

Robert Burnys, after he had pleaded guilty to the indictment against him, and before he was sentenced, was also called as a witness on the part of the State, and testified in substance: "I know Gale and Roberts; I have known them eight or nine months; Roberts lived about a mile from me, and Gale about half a mile; I was at the lodge the night the barn was burned; either Gale or Roberts went from my house to the lodge with me; I don't know which it was; we had arranged to burn the barn that night."

"Question. Did you ever make an attempt before?

"Answer. Yes, about two or three weeks before this we arranged to burn it; we all went by the barn but saw the door open and passed on by; we thought some one was inside; there was generally a watchman around.

"Q. Where did you go after that?

"A. Roberts and I met at my house the evening before the barn was burned, but Gale didn't come so we put it off. The next night after lodge was out, Gale and Roberts and I went to burn the barn; when we reached the fence around the field in which the barn stands, we climbed over and lay down to listen if any one was about; we may have been there half an hour, and we may have lain an hour; I cannot tell; and not hearing anything, we went up to the barn; I had some powder and fuse and matches in my pockets; I gave them to Gale and Roberts; they went around between the barn and the hay-stack, and I stood off as guard; I did not see who set the fire; when they came out we started and ran; I cut through the fields towards my house; and Gale and Roberts started in the direction of theirs; my wife never told me not to burn the barn or opposed me in any way; I never threatened to kill her if she told.

"Q. Where did you get that powder you used to fire the barn with?

"A. From Beck's powder-house.

"Q. Who was with you?

"A. Roberts.

"Q. How did you get in?

"A. We broke the lock.

"Q. State whether you recognize that powder? (Exhibiting powder in evidence.)

"A. Yes, that's the powder we got.

"Q. What did you do with it?

"A. Took it down and hid it in some brush.

"Q. You do not know how many cans you got?

"A. We got two large twenty-five-pound cans and some small ones, I don't know how many, and some fuse; when we divided them I remember I had two cans more than Roberts.

"Q. What did you do with that powder after taking it from Beck's house?

"A. We took it first about two hundred yards from my house and hid it in the brush; then afterwards we got it and took it over to my house and buried it under my house; Gale and I took some of it afterwards to his place.

"Q. Did Roberts tell you he was going to make Mrs. Burnys join the society to keep her from telling?

"A. I think he did say something to that effect."

Captain Farrell, another witness on the part of the State, testified: "I am captain of police; about two or three days after Roberts was arrested, Gale was put into the cell to talk with him; I stood on the outside near the wall and could hear nearly everything that was said; they talked in whispers; the wall is made of thin boards and there are some small holes in it; you can hear a whisper; they kept rattling the straw mattress and I did not hear everything that Roberts said; I could hear everything that Gale said distinctly; Roberts said to Gale: 'It is singular you are put in here, what is the reason?' Gale told him there were some women in his cell and he was put in with him until they were removed. Then I heard Roberts say: 'Don't give yourself away, and the I. W. A.'s will help us out; don't put any dependence in any lawyer the court will appoint;

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we want our own lawyer; don't speak to any one about the case at all. Remember Shakspeare says: "A closed mouth catches no flies."'"

The foregoing was all the evidence in the case tending to connect the defendant with the crime charged.

A great number of exceptions were taken upon the trial upon the part of the defendant: (1) To the introduction of evidence on the part of the State; (2) to the giving of instructions by the court to the jury; and (3) to the refusal of the court to give instructions asked on the part of the defendant.

All of the evidence offered on the part of the State tending to prove a conspiracy between Burnys, Gale, and Roberts to commit the crime charged, and all the evidence tending to prove the preparations for its commission, was objected to on the part of the defendant, but his objections were overruled, to which ruling exceptions were duly taken. Upon the argument here the objections to the evidence tending to prove the conspiracy were not insisted upon, and must, therefore, be deemed waived or abandoned. The principal objection to the other evidence was its incompetency, for the reason it tended to prove the commission of another crime.

1. A somewhat careful review of the evidence satisfies us that this objection is not well taken. The obtaining of powder from Beck's powder-house, considered by itself, is not a crime; nor was the breaking of the lock for that purpose necessarily and under all circumstances criminal. It does not distinctly appear whether their acts were with or without Beck's knowledge or consent, nor does it appear that they were done with a felonious intent. The presumption is that these acts were innocent and lawful until their criminality is made to appear, that is, with what intent they were done, and we cannot, for the purpose of reversing this judgment, presume they were criminal. But admitting that the taking of the powder was larceny, and the breaking of the lock and the entry into the house for that purpose was burglary, we have no doubt but that the evidence was competent. It was the preparation of the means to commit the particular crime for which the appellant stands indicted, and the

two transactions are so connected together, that one cannot be shown without proof of the other. The inception of this crime was the conspiracy between Burnys, Gale, and the defendant, to burn the barn in question. After that agreement had been made between these parties, whatever any or either of them did or said thereafter in furtherance of the conspiracy is competent evidence against any or all of them. The procuring of the powder and fuse as a means to accomplish the end, no difference when or how procured, is a fact, which the State had a right to submit to the jury as one of the circumstances of the alleged crime, to be weighed and considered by them for whatever they might deem it worth. It was a part of the preparation to commit a contemplated crime, and as a fact to be proven on the trial of the defendant for the commission of that crime, it stands on the same principle as the procuring of a deadly weapon, poison, or other means to commit murder, or the preparation of dies or plates to counterfeit the coin or currency of the country, or the preparation of the tools or implements or means to commit burglary or any other crime. All of the acts of the parties done in furtherance of the common design, though separated by time, and not continuous, constitute one entire transaction, and may be shown upon the trial.

2. The defendant's counsel asked the court to instruct the jury as follows: "If there is any one single fact proved to your satisfaction on the part of the defense, by a preponderance of evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and you should acquit the defendant." This request was refused by the court, and, we think, properly. The objections to such an instruction are numerous. In such a case as this, when the evidence is direct and not circumstantial, the jury ought to weigh the entire evidence, and determine the defendant's guilt or innocence by the effect produced upon their minds from such general consideration of all the facts, and not from isolated, separate, or disjointed facts. In the next place, this instruction if it had been given by the court would have been an unwarranted invasion of the province of the jury by the court. It is not for the court to

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say in any case, where there is any evidence tending to prove or disprove a particular fact, what its effect shall be, or what weight ought to be attached to it by the jury, or what shall be sufficient to raise a reasonable doubt in the minds of the jury. It is the peculiar and exclusive province of the jury to determine all such questions, and their right to do so cannot be influenced or in any manner controlled by the court. The court did not err, therefore, in refusing to give the instruction asked.

3. *Reasonable doubt.* The defendant's counsel also asked the court to give the jury the following instruction:—

"Reasonable doubt is not a mere possible doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves your minds in such a condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge. It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a moral certainty." This instruction was refused by the court, for the reason that the same had been, in effect, given by the court. The charge of the court on the subject of reasonable doubt was as follows: "A reasonable doubt is not every doubt; it is not a captious doubt. It is such a condition of mind resulting from the consideration of the evidence before you, as makes it impossible for you as reasonable men to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous; but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory."

The instruction asked by appellant is, in substance, the language of Chief Justice Shaw in *Commonw. v. Webster*, 5 Cush. 295, and is generally accepted as a concise definition of a reasonable doubt; but it is not the only definition of a reasonable doubt. Any phraseology which conveys to the minds of the jury, clearly, distinctly, and intelligibly, the same idea will be sufficient, and we think the charge given did this. The jury could not have been misled as to the degree of proof required to

convict under this charge; and unless they were misled, and by reason thereof convicted the defendant on less or weaker evidence than they ought, we cannot say there was error. We think, as a matter of practice in criminal cases, when the defense asks instructions which are free from legal objections, that they ought to be given, even though the general charge of the court may have covered the same ground; but in case of refusal, unless we can clearly see that the defendant was prejudiced by such refusal, the judgment will not be reversed.

4. *Evidence of accomplice.* The defendant also asked the court to instruct the jury as follows:—

“Mrs. Almira Burnys is an accomplice in this crime, charged against this defendant, as are also Charles Gale and Robert Burnys, and you cannot convict the defendant upon their testimony, unless it be corroborated by such other as, unaided by their testimony, tends to connect the defendant with the commission of said crime.” This instruction was also refused, and the defendant excepted. The general rule of law, that to justify a conviction on the evidence of an accomplice his evidence must be corroborated, is not controverted. The Criminal Code, section 172, states it thus: “A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient, if it merely shows the commission of the crime, or the circumstances of the commission.” No conviction could be had on the uncorroborated testimony of Burnys and Gale. They were “accomplices” within the meaning of this section. Thus far the State and the defense agree; but the defense claims that Mrs. Burnys is an accomplice also. Webster defines accomplice to be an associate in crime; a partner or partaker in guilt. Burrill’s Law Dictionary defines the term thus: “One of several concerned in a felony; an associate in crime; one who co-operates, aids, or assists in committing it.” This term includes all the *particeps criminis*, whether considered in strict legal propriety as principals or accessories. And Wharton’s Criminal Evidence, section 440, says: “An accomplice is a person who knowingly, voluntarily, and with

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common intent with the principal offender, unites in the commission of a crime." And to the like effect is *Cross v. The People*, 47 Ill. 152; *Davidson v. State*, 33 Ala. 350.

Apply these definitions to the evidence, and they make it too plain for argument that the appellant's exception is not well taken. Mrs. Burnys did not counsel, aid, or abet in any way; did not in any manner participate in the crime; and her knowledge of it was derived from the accident of being the wife of one of the criminals.

5. *Variance between indictment and proof.* The defendant's counsel also asked the court to give the jury the following instruction:—

"This indictment charges the defendant with having wilfully, maliciously, and unlawfully set fire to and burned W. S. Ladd's barn. If you find from the evidence beyond a reasonable doubt that this defendant set fire to and burned a stack of hay, although wilfully and maliciously and unlawfully, and although from it the barn caught fire and burned, it is a variance between the indictment and proof, and the defendant should be acquitted."

The court did not err in refusing to give this instruction. The defendant's motive and purpose in firing the hay were questions of fact for the jury; and the evidence offered tended very strongly to prove that the real purpose was to burn the barn, and the hay was fired as the readiest and quickest method of accomplishing that object. Under such circumstances there was no variance, and the court did right in refusing the instruction.

Motion for a new trial cannot be reviewed. The general charge of the court on the subject of accomplices as to Burnys and Gale, though excepted to at the trial, was not claimed to be erroneous here, and those exceptions must be deemed to be abandoned. The other exceptions are not available on this appeal, for the reason that the ruling of the trial court on a motion for a new trial cannot be assigned for error in this State. Our Code has made no provision for reviewing the ruling of the trial court on such motion, and therefore this court cannot examine the same. But if it were competent to do so it would not avail the defendant in this case, for the reason the jury is to judge of the weight and

effect of the evidence, and there can be no doubt in this case there was evidence which justified the jury in finding the verdict.

We have examined this case with care, for the reason the parties implicated seem to have gone directly from a lodge-room to the scene of the crime, and after discovery, they appear to have relied upon an order called the "I. W. A.'s" for help. And the evidence given upon the trial tended to show that parties concerned in its commission, with others, sought to bind themselves together by extrajudicial oaths, and by ties which they thought to make stronger than the law; but the result has demonstrated the futility of the attempt, and that the purposes of the law are not to be thwarted by such means. The real purposes of the organization, so far as they were disclosed upon the trial, are revolutionary and highly criminal. They assumed to act as self-appointed regulators, and to determine the propriety of the conduct of citizens of this State in the management of their private business, and to direct whom they *shall* and whom they *shall not* employ; for the right to determine who shall *not* be employed implies the right to say who shall be. It reviews in secret the acts and conduct of the citizens, and its members emerge from the lodge-room and hasten away to execute private and summary vengeance upon those who have fallen under the ban of its displeasure. They attempt to prescribe a rule of civil conduct for the government of all the people of this State, unknown to our statutes, and at war with the idea of a government regulated by law, and to inflict punishment for a violation or a disregard of its behests. In this instance it was arson. The next may be murder. The spirit that incites the commission of that crime will not stop there. All human experience has demonstrated this. There is no half-way station between the benign control of the law and the wildest anarchy. If the commission of one crime does not bring the citizen to the feet of the lawless cabal, another must follow, and so on in gradual succession until the foundations of social order are broken up and the spirit of anarchy be enthroned in its stead. The object and direct tendency of such an organization cannot be too promptly condemned. They are at war with the law, our social and political life, and the genius

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of our institutions. Such an organization is not of American birth, and cannot take root or flourish in an American commonwealth.

The views we have expressed on the rulings of the court below require an affirmance of the judgment.

[Filed May 24, 1887.]

J. C. NICKELSON, RESPONDENT, v. W. B. SMITH,
APPELLANT.

JUSTICE'S COURT — VERDICT OF A JURY IN. — Where a jury returned in a Justice's Court a verdict in favor of defendant, and the same was received, and they thereupon informed the court that they intended by the verdict to find in favor of the plaintiff, and the justice then allowed them to separate to appear at another day, at which time they did appear and were allowed to render another verdict in favor of the plaintiff as originally intended, and were then discharged; *held*, (1) That the first paper filed was not their verdict, as the jury did not agree on the same as such. (2) That the second verdict was irregular, as the jury had been allowed to separate, and should be set aside and a new trial had.

APPEAL from Wasco County. **Reversed.**

Dufur & Dufur, for Respondent.

The matter in explanation set out in the docket is no part of the verdict. (Code, § 210, p. 147.)

Jury must be kept together until they agree upon a verdict. (Code, § 200, p. 146.)

There is no authority for sending the case back for trial. (Code, § 575, p. 229.)

Respondent is entitled to a judgment for \$18.99 upon the original verdict.

George Watkins, for Appellant, filed a written argument.

STRAHAN, J.—The appellant here originally commenced an action against the respondent before W. E. McArthur, Esq., justice of the peace for Dalles precinct, in Wasco County, Oregon, to recover a balance alleged to be due him of \$52.88. The defendant filed a counter-claim, amounting to \$76.09, and

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demand a judgment for \$24.21. Issue having been duly taken by the reply on the new matter contained in the answer, the defendant in that proceeding demanded a jury. What occurred after the evidence was closed, and the cause was argued by counsel, is fully disclosed by the record:—

“The case was then submitted to the jury, and they retired under a sworn bailiff. At about 7:30 o’clock P. M. the jury, having been out about one hour, returned into court—Geo. Watkins, Esq., one of plaintiff’s attorneys, being present—and presented to the court what purported to be their verdict, a certain writing of which the following is a copy, to wit:—

“‘Justice’s Court for Dalles Precinct, County of Wasco, State of Oregon.

“‘*Wilson B. Smith, Plff. v. J. C. Nickelson, Deft.*

“‘We, the jury impaneled to try the above cause, find for the defendant, and assess his damages at \$18.99.

(Signed,)

“‘H. SOLOMON.

“‘C. W. JONES.

“‘G. F. SETTLEMIRE.

“‘A. J. SIMMONS,

“‘G. W. WERLIN.’

“Which verdict was received and filed November 27, 1885. The jury then explained in open court that they intended to allow the defendant the sum of \$18.99 as a counter-claim to the plaintiff’s cause of action, thereby reducing plaintiff’s claim against the defendant, as set forth in his complaint, to the sum of \$33.89, which amount they found that the plaintiff was entitled to recover from the defendant in this action. The paper purporting to be the verdict of the jury not being actually the verdict found by the jury, and the court not being advised what course should be pursued in the matter, continued the case until to-morrow morning, at ten o’clock A. M., for advisement. It was ordered that the jury be present at that time. In the mean while the jury were allowed to separate, but were not discharged.

“W. E. McARTHUR, Justice of the Peace.”

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“November 28, 1885.

“The jury all being present, and the attorneys for the plaintiff and defendant also being present, the court submitted the case to the jury, against objections of defendant’s counsel; and, after deliberation, they rendered their verdict in open court, all parties in interest being present, or represented by learned counsel. The following is a copy of the verdict, to wit:—

““In Justice’s Court for Dalles Precinct, Wasco County, State of Oregon.

““*Wilson B. Smith, Plaintiff*, v. *J. C. Nickelson, Defendant*.

““We, the jury in the above-entitled action, find for the plaintiff, and assess his damages at \$33.89 cents.

““H. SOLOMON, Foreman.

““G. W. WERLIN.

““C. W. JONES.

““A. J. SIMMONS.

““G. F. SETTLEMIRE.”

“Which verdict was received and filed November 22, 1885. Thereupon the jury were discharged.

“W. E. MCARTHUR, Justice of the Peace.”

From the record of the justice it further appears that the plaintiff moved for judgment on said last-named verdict in his favor for \$33.89; and the defendant at the same time moved for a judgment in his favor for \$18.99, on the alleged verdict of the preceding day; and the court, after hearing the argument of counsel in favor of and against said respective motions, still being in doubt what judgment ought to be given thereon, took both of said motions under advisement. Thereafter, on the twenty-second day of May, 1886, said justice overruled the defendant’s motion, and granted the motion of the plaintiff.

The defendant, having demanded a jury, had no right of appeal. (Gen. Laws, p. 478, § 120.) The defendant accordingly sued out a writ of review, and removed the record of the justice into the Circuit Court. That court annulled the judgment of the justice, and remanded the cause for a new trial,

from which last-named judgment this appeal is taken. Numerous errors are assigned in the notice of appeal. The only errors material to be considered are those relating to the action of the court in reversing the judgment of the justice, and in remanding the cause for a new trial.

Verdict of jury in Justice's Court. The first question which naturally presents itself here for our consideration is, which of the two papers presented by the jury to the justice is their verdict?

Section 7, page 463, General Laws, provides, in substance, for the same course of procedure in a Justice's Court as prevails in a court of record, "except as in this act otherwise specially provided." Section 210 of the Civil Code, thus made applicable, provides: "When the verdict is given, and is such as the court may receive, and if no juror disagree, or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and, under the direction of the court, shall be substantially entered in the journal as of the day's proceedings in which it is given."

Now, it is too plain for argument that the first paper signed by the jury and delivered to the justice, though in form a verdict, did not contain or embody the result of their deliberations. As a verdict every juror did object to it at the time, or, in the language of the section quoted, "disagreed." It then became the duty of the justice to send them out again, to enable them to put the verdict in such form as would give legal effect to the result of the trial. In *Warner v. New York Cent. R. R. Co.* 52 N. Y. 437, it was held that the announcement of a verdict, or the bringing in of a sealed verdict by a jury, and the entry thereof by the clerk in his book of minutes, is not such a recording as makes the verdict fixed and unalterable; but, until the jury are dismissed, their power over the verdict, and their right to alter it so as to make it conform to their real and unanimous intention and purpose, continues. And to the same effect is *Dalrymple v. Williams*, 63 N. Y. 361.

This view of the subject disposes of the defendant's claim that

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the paper purporting to be a finding in his favor was to be treated as the verdict, and it results as a necessary consequence that the court had the power to allow the jury to put their finding in such form as would be according to their real and unanimous intention and purpose.

Jury not allowed to separate. But when should this power have been exercised? Must it be done at the time the disagreement was made known to the court, and before the jury were allowed to separate, or might it be done at some indefinite time in the future, when it would be convenient for the court to call the jury together for that purpose? Or, in other words, could the court, without the consent of the parties, allow the jury to separate after the cause had been submitted to them, and then bring them together again, against the protest or objection of either party, and receive their verdict? Such a practice does not appear to be in accordance with the plain requirements of the statute of this State. The Civil Code, section 200, provides: "After hearing the charge, the jury may decide in the jury-box, or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury thus together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon a verdict. . . ."

We think it was an erroneous exercise of the judicial functions of the justice to allow the jury to separate without the consent of the parties, and to permit them, on the next or some subsequent day, to return and complete their verdict against the objections of either party. Such a practice, if permitted, is liable to great abuse, and we think we ought to give full effect to the requirements of the section above quoted. The justice had ample power to permit the jury to put their verdict in proper form at the time of the disagreement. He could have

Argument for Appellant.

sent them out for further deliberation, or they could have then decided in the jury-box; but the practice of allowing a jury to separate after a cause has been submitted, and without the consent of the parties, would be clearly in contravention of our statute. The verdict of the jury was therefore irregular—not void—and must be set aside, and a new trial directed before the justice. The conclusions of the Circuit Court seem to be in harmony with these views, and its judgment must therefore be affirmed.

[Filed May 27, 1887.]

STATE OF OREGON, RESPONDENT, v. RICHARD E.
MARPLE, APPELLANT.

JUDGMENT IN CRIMINAL ACTION.—Where a judgment dated April 9, 1887, provides that the defendant be hanged on the twenty-ninth day of June, 1887, and a warrant of execution is issued reciting the judgment of conviction, and appointing the second day of June, 1887; *held*, that this was an irregularity under section 1421 of Hill's Code, providing that the warrant of death must be executed "not less than thirty nor more than sixty days from the time of judgment," but not such as would warrant granting a new trial, and that the judgment should be modified so as to adjudge in effect that defendant be detained until such day as shall be named in the warrant of execution to be thereafter designated by the court from which the appeal was taken; that the first warrant be set aside, and the case remanded, with directions to carry out the judgment of death in accordance with the verdict of the jury.

APPEAL from Yamhill County. Modified.

H. Y. Thompson, for Appellant.

The verdict is fatally defective, in that it does not specify the degree of the crime of which the defendant is convicted. (Code, 363; *People v. Campbell*, 40 Cal. 129; Bishop on Criminal Law, § 797; *State v. Dowd*, 19 Conn. 388; *Oliver v. State*, 17 Ala. 587; *People v. Marquis*, 15 Cal. 38; 3 Graham & Waterman on New Trials, 1378; *Dick v. State*, 3 Ohio St. 89; *Park v. State*, 4 Ohio St. 234.)

There is no valid death warrant. The judgment is that the defendant be executed on June 29th. The warrant directs his execution on June 2d.

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146	15

By the Court.

Geo. W. Belt, District Attorney, and McCain & Hurley, for Respondent.

The fixing of the date of execution in the judgment is void, and is not a part of the sentence. (*Lowenburg v. People*, 27 N. Y. 337; *Gray v. State*, 55 Ala. 86.)

Statutes directing prisoners to be executed within a certain time are directory simply. (20 Ala. 15; Bishop on Statutory Crimes, § 255.)

This court will not reverse for error that which could not prejudice defendant. (*State v. Brown*, 7 Or. 186; *State v. Fitzhugh*, 2 Or. 227; Code, 362, § 70; *Hawkins v. State*, 44 Am. Dec. 431; *Terr v. O'Kelly*, 1 Or. 51.)

By the COURT.—The appellant was indicted, tried, and convicted in the above court of the crime of murder in the first degree, and the following judgment and sentence were given against him:—

“April 9, 1887.

“*State of Oregon v. Richard E. Marple.*

“INDICTMENT FOR MURDER.

“Now at this day this cause comes on for hearing on the motion of the said defendant to set aside the verdict of the jury heretofore rendered in this cause, and for a new trial, the State appearing by Geo. W. Belt, prosecuting attorney, and by H. Hurley, and the defendant in his own proper person, and H. Y. Thompson, his attorney; and after argument by counsel, and fully considering the said motion, it is ordered that the same be overruled; whereupon, on motion of Geo. W. Belt, prosecuting attorney, the court proceeds to pronounce and render judgment and sentence against the said Richard E. Marple, and the court asked the defendant, in the presence of his said attorney, what he had to say why the court should not now pronounce and render sentence and judgment against him in accordance with the verdict of the jury heretofore rendered against him in this cause, whereupon the said defendant made a statement to the court; and immediately thereafter, it appearing to the court that

By the Court.

the said Richard E. Marple had been duly indicted and convicted of the crime of murder in the first degree, for feloniously, wilfully, purposely, and of deliberate and premeditated malice, killing one D. I. Corker, it is therefore ordered and adjudged by the court that the said Richard E. Marple is guilty of said crime of murder in the first degree; and that it is further ordered and adjudged by the court that the said Richard E. Marple be taken from this place to the jail of this county of Yamhill, and that he be there kept in close confinement until the twenty-ninth day of June, 1887; and that on said twenty-ninth day of June, between the hours of ten o'clock A. M. and two o'clock P. M. of said day, he be taken from said jail to the place to be prepared for the execution of this judgment in this county, and that he be then and there hanged by the neck until he is dead.

"R. P. BOISE, Judge."

That thereupon the judge of said Circuit Court issued and delivered to the sheriff of said Yamhill County, a warrant under his hand and the seal of the said Circuit Court, and duly attested by the clerk of said county, which said warrant stated the said conviction and judgment, and appointed the second day of June, A. D. 1887, as the day upon which the said judgment is to be executed.

The defendant appeals from the judgment pronounced against him, as above stated, and gives notice that he will rely upon the following errors of law appearing of record upon the trial of said cause: *First*, the indictment does not charge the defendant with any crime; *second*, there was no verdict of the jury upon which to base the said judgment and sentence; *third*, said judgment and sentence was pronounced by the court without legal power or authority; *fourth*, that the death-warrant does not conform to the laws relating thereto, or to the judgment of the court in said action against the defendant.

We have examined the alleged errors, and are of the opinion that the three first ones are not well taken. The fourth one is true as a statement of fact, as the part of the record above set forth shows, though we do not think that it presents such an error as will authorize the court to grant a new trial. We are of the

Points decided.

opinion, however, that the record should be corrected, before any attempt is made to enforce the judgment, so as to make it conform to law, and be consistent with itself. The judgment appealed from will therefore be modified so as to adjudge, in effect, that the said Richard E. Marple be detained and imprisoned until such day as shall be designated and named in the warrant of execution of the judgment, signed, attested, and delivered as provided by law, and the case be remanded to the said Circuit Court, with directions to enter such judgment and sentence as here indicated, and such warrant of execution be thereupon issued; that the warrant of execution of the said judgment now in the hands of the sheriff of said Yamhill County be set aside, and held for naught.

15	208
15	396
14*	523
15*	665

[Filed June 13, 1887.]

H. T. BINGHAM, ET AL., APPELLANT AND RESPONDENTS,
v. CHARLES SALENE, ET AL., APPELLANT AND RE-
SPONDENTS.

LICENSE TO HUNT—PROFIT A PRENDRE—GRANT OF.—A grant of "the sole and exclusive privilege and easement to shoot, take, and kill" wild fowl "on the lakes, sloughs, and waters" of the grantor, executed to the grantees, "their heirs and assigns forever," with a privilege of "ingress and egress to and from said lakes, waters, and sloughs for the purpose of shooting and taking wild fowl as aforesaid," is a grant of a *profit a prendre*, and not a mere license revocable at pleasure.

SAME—GRANT—CONSTRUCTION OF—PERMITS.—That in the exercise of this right the grantees are strictly confined to the places indicated in the grant, the lakes, sloughs, etc., and the grant does not authorize the indiscriminate granting of permits to others to exercise the same privilege.

CONTRACTS—BETWEEN ATTORNEY AND CLIENT.—A contract which has been agreed upon between an attorney and one who afterwards becomes his client, but is not made obligatory until after the relation of attorney and client has been formed, will be sustained, where it appears that the transaction is fair and honest, that the consideration was ample, and that the client, though an illiterate person, was fully informed of the terms of the contract, and the attorney was not guilty of any breach of trust or confidence.

INJUNCTION, GROUNDS FOR REFUSING.—Where it appears that S. has granted to B. the sole and exclusive right to hunt upon the waters of S.'s land, and that B. has issued permits to numerous persons who have hunted not only on the waters, but also on the lands of S., have conducted themselves in an insolent manner, and have wounded the domestic animals of S., the court will not grant an injunction restraining S. from acts inconsistent with the nature of the contract on his part.

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48	459

Argument for Respondents.

A. R. Coleman, for Appellant.

A grant of a right to kill and take game on the lands of the grantor is a grant of an interest in the land itself, and is within the Statute of Frauds. (*Webber v. Lee*, Law R. 9 Q. B. D. 315; *Wickham v. Hawker*, 7 Mees. & W. 63.)

The grant is a license of a *profit a prendre*. (*Ewart v. Graham*, 7 H. L. Cas. 331.)

One who takes game on another's premises gains no title, if a trespasser. (Schouler on Personal Property, § 49; *Blades v. Higgs*, 13 Com. B. N. S. 844; 11 H. L. Cas. 621; *Riggs v. Lonsdale*, 1 Hurl. & N. 923; *Carryington v. Taylor*, 11 East, 571; 14 Com. B. N. S. 550; 3 Hurl. & C. 644; also, *Patison v. Gilford*, 18 Law R. Eq. 259.)

A fishing right in waters not navigable belongs to the owners of the soil. (Washburn on Easements and Servitudes, 566-569; *Mathews v. Treat*, 75 Me. 594; *Wyman v. Olliver*, 75 Me. 421; *Beckman v. Kreamer*, 43 Ill. 447.)

Whalley, Bronough & Northup, for Respondents.

No interest passed by the deed.

Easements are rights of enjoyments in, or issuing out of another's land. (Tiedman on Real Property, § 597.)

Profit a prendre is a right to take something from the land. (Tiedman on Real Property, § 59.)

Under the deed nothing but a license was created, and a license is revocable at will by the owner of the land. (Washburn on Easements, 5; *Wolfe v. Frost*, 4 Sand. Ch. 472; *Ex parte Colerun*, 1 Cowen, 568.)

The right to take and kill wild fowl is not a right of *profit a prendre*, for wild fowl are *ferre naturæ*, and not the subject of a grant.

Plaintiffs had no right to shoot on the land.

As the relation of client and attorney existed, the burden of establishing the fairness is upon the plaintiff. (Story on Equity Jurisprudence, §§ 310, 311, 312; Bigelow on Frauds, 196; *Howell v. Ransom*, 11 Paige, 538; *Starr v. Vandersheyder*, 9

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Johns. 253; *Jennings v. McConnell*, 17 Ill. 148; *Ford v. Harrington*, 16 N. Y. 258; *Meryman v. Uber*, 59 Md. 588; 43 Am. Rep. 564; *Oakley v. Ritchy*, 28 N. W. Rep. 448; *Clerrie v. Englebrecht*, 5 Atl. Rep. 718; *Dunn v. Dunn*, 7 Me. 842; *Lane v. Black*, 21 W. Va. 617; *Weeks on Attorneys at Law*, § 273, pp. 442, 450, 456; *Howell v. Baker*, 4 Johns. Ch. 118; *Hawley v. Cramer*, 4 Cowen, 717; *Bernieu v. McClane*, 1 Hoff. Ch. 420; *Harper v. Perry*, 28 Iowa, 57; *Judah v. Trustees*, 23 Ind. 278; *Dunn v. Record*, 63 Me. 19.)

LORD, C. J. — This is a suit in equity to enjoin the defendants from interfering in any manner with the alleged exclusive right and privileges of the plaintiffs to go upon and over certain lands of the defendants, described herein, for the purpose of shooting, killing, or taking wild fowl in the lakes, sloughs, and waters therein and thereon, and to restrain the defendants from inviting or allowing any other person or persons so to do. Briefly, the grievances complained of are that the plaintiffs, by virtue of a deed executed to them, whereby the defendants conveyed to them, “their heirs and assigns forever, the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon our lands, lying in Columbia County, State of Oregon, the said lands being more particularly described as follows: . . . And also, for the consideration above mentioned, the right of ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl as aforesaid, to have and to hold the said easement and privilege, to them, the said H. T. Bingham and E. W. Bingham, their heirs and assigns forever,” which said right and privilege depended for its value on its exclusiveness; and that, in order to protect the same, the plaintiffs posted notices upon the lands of the defendants forbidding all persons from going upon the lands of the defendants for the purpose of shooting wild fowl upon the lakes and waters thereon, and that the defendants, knowing the plaintiff’s rights in the premises, tore down and destroyed said notices, and made threats of assault and personal injury to plaintiff-

iffs should they go upon said land to exercise their right and privilege, etc. And, further, that the defendants have invited and permitted professional hunters to take and kill wild fowl upon said lakes and waters, to the injury of the plaintiffs, and threaten and will continue to so do unless restrained. After denying the matters alleged, the defendants affirmatively set up that the English language is not their native tongue; that they cannot read or write it, and understand it but indifferently; that they are ignorant of all forms of law; and that plaintiffs are practicing attorneys, and were, at the time of making the deed aforesaid, employed by the defendants as their attorneys in certain matters of business, and that plaintiffs asked them for the privilege of going upon the lands to hunt wild fowl, and that the defendants expressed themselves as willing to give them, and no one else but them, the privilege to hunt upon said lands, and that thereupon the plaintiffs prepared the above grant, but at the time of signing the same the defendants declared that they did not understand its import, and particularly the defendant Christiana, to whom then and now belong said lands, and that the plaintiffs informed her that it was nothing but the privilege to go down upon said lands and hunt, etc., and that the defendants understood that the conveyance, by its terms, granted no more than a permission to hunt upon said premises; that plaintiffs have given others permission to hunt upon the premises; and that, during the hunting season, they have come upon the lands, trampled and injured the grass and crops, and by shooting in the vicinity have frightened the stock of defendants, etc., and asks that the deed be declared null and void. The reply put in issue all the affirmative matter alleged. The suit was referred and reported by the master, which report was set aside, and new findings made by the court, on which a decree was entered, and from which both parties appeal.

By their brief and at the argument, the first inquiry of the counsel was directed to the nature and import of the exclusive privilege granted by the deed; the counsel for the defendants claiming that nothing but a license was created by it, while the counsel for the plaintiffs insisted that it was a grant of a *profit a prendre*.

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The distinction between a grant and a license is to be taken as understood, as the contention here is that the right and privilege granted by the terms of the deed do not constitute a grant of a license of a *profit a prendre*. Rights exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof—as rights of pasture or digging of sand—are termed *profits a prendre*. They are said to differ from easements, in that the former are rights of profits, and the latter are mere rights of convenience without profit. “A right to take something out of the soil of another is a *profit a prendre*, as the right of common, and also some minor rights, as a right to take drifted sand, or a liberty to fish, fowl, hunt, and hawk.” (1 Crabb’s Real Property, 125; Phear. Water, 57.) In *Ewart v. Graham*, 7 H. L. Cas. 234, Lord Chancellor Campbell said: “The property in animals *feræ naturæ*, while they are on the soil, belong to the owner of the soil, and he may grant a right to others to come and take them, by a grant of hunting, shooting, fowling, and so forth. That right may be granted by the owner of the fee-simple, and such a grant is a license of a *profit a prendre*.” It is seen, then, that rights which are said to be in *prendre* are distinguished again into rights coupled with profits, which are called *profits a prendre*, or rights without any profits, which are called easements. But “the distinction between an interest in the soil, or a right to profit in it, and an easement, is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles to determine it.” (Davis, J., in *Hill v. Lord*, 48 Me. 99.) “For a *profit a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself.” (Walworth, Ch., in *Post v. Pearsall*, 22 Wend. 425.) And Mr. Washburn says: “This right of a *profit a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement, appurtenant to such estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same.” (Washburn on Easements, 7.) But it has been expressly held

that the right to enter upon the lands of another to cut grass, for pasturage, for the purpose of hunting, or for fishing in an unnavigable stream, is an interest in the land, or a right to take a profit in the soil. (Cro. Eliz. 180, 363; *Pickering v. Noyes*, 4 Barn. & C. 639; *Wickham v. Hawker*, 7 Mees. & W. 63; *Waters v. Lilley*, 4 Pick. 145.) A grant of a right to kill and take game on the lands of the grantor is a grant of an interest in the land itself, and within the Statute of Frauds. (*Webber v. Lee*, Law R. 9 Q. B. D. 315.) In *Wickham v. Hawker*, *supra*, it was held that a grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come in and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure, and therefore it authorized the grantee, his heirs and assigns, to hunt, fish, and fowl by his servants, in his absence, and that such a liberty is a *profit a prendre*. (See, also, Washburn on Easements, 8-11; Washburn on Real Property, 313; Gould on Waters, §§ 24, 25, 184, 185.)

Now, let us turn to the deed, and determine what the parties intended, and what interest passed. By it the defendants, for a consideration expressed, granted in words *de præsenti*, to the plaintiffs, their heirs and assigns forever, the sole and exclusive right and privilege to shoot, take, and kill any and all wild fowl upon and in any lakes, sloughs, or waters situate upon their lands, and the right of ingress and egress to and from said lakes, sloughs, and waters for such purpose. As the owners of the lands which included such lakes, sloughs, and waters thereon, the property of animals *feræ naturæ*, while on the lands or such waters, belonged to the defendants. By virtue of such ownership, the defendants had the exclusive right to shoot, take, and kill such wild fowl upon the lakes or other waters upon their lands, and they had the right to grant to the plaintiffs the sole and exclusive right to take and kill such wild fowl at the places designated in their deed. But the sole and exclusive right granted to the plaintiffs to take and kill any and all wild fowl on such lakes, sloughs, and waters is inconsistent with the right of any other persons to take or kill them, or to use and exercise such privilege at such places. It is a right exclusive of all others at such particular or

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specified places. (*Holford v. Bailey*, 66 E. C. L. 425-447; 55 E. C. L. 1000-1007.) If this the plaintiffs' granted — this sole and exclusive privilege to take and kill such game at such places on their land — it divested them of all right and authority to permit or grant other persons to take and kill such wild fowl upon any lake, slough, or waters lying upon their lands. Here there is a grant of a sole and exclusive right and privilege to the plaintiffs, their heirs and assigns forever, to shoot, take, and kill such game on the lakes and waters upon the lands of the grantors, and which right, in *Webber v. Lee*, *supra*, was held to be a grant of an interest in land, and within the Statute of Frauds. This right, then, to take something out of the soil, or from the land of another, which includes shooting, hunting, and fishing, is a *profit a prendre*; and, Mr. Washburn says, "is so far of the character of an estate or interest in the land itself that, if granted to one in gross, it is treated as an estate, and may therefore be for life or for inheritance." (Washburn on Easements, 9). It is manifest, therefore, that the contention that the deed only created a license, revocable at the pleasure of the defendants, cannot be sustained.

We do, however, concur in the construction of the deed insisted upon by counsel for the defendants, that the use and enjoyment of the privilege is limited and confined strictly to the places designated. There is no authority or privilege granted to shoot, take, and kill wild duck or other wild fowl on the lands of the defendants. It is confined to the waters lying upon the lands of the defendants. The deed is specific upon this point. The right and privilege to be exercised, used, and enjoyed, is "upon and in any and all lakes, sloughs, and waters situate, lying, or upon our lands," etc. The plaintiffs have the right to shoot, take, and kill any and all wild fowl in or upon the lakes and waters situate and lying upon the lands of the defendants, but the rights and privilege is limited and confined to such designated places, and cannot be exercised elsewhere by force of the grant.

We concur, also, in the construction maintained by counsel for the defendants, that the deed does not authorize the indiscriminate giving of passes or permits to various and numerous persons, to

use and enjoy the sole and exclusive right and privilege granted to them, their heirs and assigns forever. For the purpose of enjoying the privilege granted, the plaintiffs may shoot and take and kill the wild fowl upon the lakes and waters on the lands of the defendants, or they may sell and assign their right and privilege, but there is no authority to give such passes or permits, by whatever name designated, to others. In *Wickham v. Hawker*, *supra*, Parke, B. said: "But this is a grant by deed to persons, 'their heirs or assigns.' It is clearly intended that not merely the particular individual named, but any one to whom they or their heirs choose to assign it, should exercise the right, which seems to us to show that it is an interest or a *profit a prendre* which is intended to be granted." And it may be said, *en passant*, that much of the trouble which has caused the present suit, as indicated by the evidence, is undoubtedly due to the misconduct and abuse of the privilege by persons to whom such permits were given. Some of these persons were not only insulting to the defendants at places upon their lands where such persons had no lawful right to be without the consent of the defendants, but they asserted defiantly the right to use, and did use, the privilege for purposes and in a manner and at places unauthorized by the terms of the grant. While "the supposed odiousness of this right," as Lord Campbell said, "cannot influence our decision," the fact, at least, admonishes us that no intendments or presumption are to be indulged in in the construction of the grant not warranted by the plain import of its terms and provisions. A grant of this description is construed strictly. The court is therefore of the opinion that such permits were unauthorized, and not within the purview of the privilege granted.

It is also contended by counsel for the defendants that the right of ingress and egress is limited to the lakes and waters. The provision on this subject is: "The right of ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl, as aforesaid." The evident object of this provision was to give the plaintiffs ingress and egress to and from the lakes and sloughs—the places where the privilege of killing and taking of wild fowl was to be exercised and used;

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and if in ingress to and egress from, or lake to slough, was over the land, the right to pass over the land for that purpose was granted. Of course, this right can and must be used and enjoyed without detriment or injury to the crops and grass and stock of the defendants.

Thus far we have been considering solely the terms of the grant as indicated upon the face of the instrument. We come now to consider the defenses of the defendants. Substantially, they are divisible into two parts; and, briefly, are (1) that the defendants, being unable to read and write, signed the deed, relying upon the representations of the plaintiffs that its provisions only created a personal license to come down to the farm of the defendants to shoot and hunt wild fowl; and (2) that at the time the deed was executed, the plaintiffs were acting as the attorneys for the defendants, and availed themselves of the confidence arising from that relation to procure their consent to grant them such privilege on the representations stated. It is sufficient to say, without going much into detail, that we do not think that either of these defenses are sustained by the evidence. It is true that the defendants cannot read or write, but both speak the English language reasonably well, and the evidence discloses that they are persons of ordinary understanding, and not negligent of their interests. At the time the deed was executed, the defendants sought the law office of the plaintiffs for the purpose of shifting the title from the defendant husband to the defendant wife to avoid a liability to which it might be exposed by remaining in his hands. The object of that arrangement, and the effect sought by the transfer, they evidently understood; and after the explanation made to them of the nature of the right and privilege contained in the deed executed to the plaintiffs, we cannot doubt that they understood it—not, it may be admitted, in the technical sense, but in the sense that it was the grant of an exclusive right in perpetuity, and not a mere personal license, revocable at their pleasure. They might not have known it was a *profit a prendre*; but, to accord to them ordinary sense after the explanation given, they must have understood that they were granting to the plaintiffs, their heirs and assigns forever, the exclusive right to shoot and take

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and kill wild fowl upon the lakes and waters on their lands. There is no difficulty in understanding the nature and duration of the privilege granted, although disagreements might arise, under the terms of the grant, as to how and where the privilege is to be used and enjoyed. This often happens with men of superior understanding and attainments in respect to writings, but it is no ground for declaring such writing invalid. We recognize it to be the duty of a party when dealing with unlettered persons who can neither read nor write, and taking from them a deed, to show, when seeking to establish or enforce some right under it, that it was read and fully explained to them before it was executed. All this was done, and the evidence to this point is explicit and conclusive. Judge Rice, who took the acknowledgment, testifies: "After the instrument was completed, which was in a few minutes, it was read over to the parties. I may have read it myself to them; but I remember distinctly that it was read by some one while I was present, and that there was a very considerable conversation between the parties and both the plaintiffs concerning the instrument and its contents. This made a very distinct impression on my mind, from the fact that there was a great deal more than I considered usual care to have the grantors fully understand the contents of the instrument." Nor do we think any declarations were made by the plaintiffs at the time, designed to deceive or mislead the defendants, or as relevant to this matter, for any other purpose than to explain the true purport of the privilege granted. All things taken together, it is certainly clear that the plaintiffs understood what they were doing, and that the privilege granted was not a mere license as alleged.

As to the correctness of the principle so ably maintained by the counsel for the defendants in respect to the duties and obligations of attorneys to their clients, the measure of faith and diligence required of them, and the great jealousy with which the courts watch all transactions between them, and the affirmative duty of the attorney to show that the transaction was fair and honest and above all suspicion—in a word, that the confidence reposed has not been betrayed—we heartily approve and indorse. The prin-

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ciple of a public policy, which affects with a presumption all transactions between persons standing towards each other in a confidential relation, that an undue influence has been exercised, and which devolves upon him who occupies the post of active confidence to show that presumption adequately rebutted, is founded in the soundest judicial wisdom. But the fact is, so far as relates to this case, it has been previously agreed, when no such relationship existed, that the grant of this privilege should be made. It is true, it had not been put into any obligatory form, and yet the evidence indicates that when done it was done in the pursuance of that agreement, and as necessary to be done before the title was transferred through a third party from the husband to the wife for the purposes already stated. Besides, we think that the transaction was fair and honest, and that the consideration given was the equivalent of the value of the privilege when granted, and that the plaintiffs were not guilty of any violation of the trust or confidence reposed in them. For these reasons, we do not think that the defense which seeks to set aside and declare invalid the grant is made out.

We now come to the grounds of the complaint, and the issue joined upon it, in connection with the evidence elicited, for the purpose of ascertaining whether the plaintiffs, in view of all the facts, have made such a case as will authorize the injunction prayed for. The facts alleged, and their denial, have already been stated. Without detail, it is sufficient to say there is evidence tending to prove the grievances complained of; and, if there was not also evidence tending to show that the plaintiffs, in the same connection, have not been free from fault, we should be disposed to grant the relief prayed for, notwithstanding our doubts that the remedy is at law, and not in equity. It was said, in *Weiss v. Jackson Co.* 9 Or. 471, that the granting of an injunction is an equitable proceeding, and that the party seeking this peculiar equitable relief should show that he has a right, under all the circumstances, to this extraordinary writ. It is admitted that the plaintiffs have issued permits to very many persons to use and enjoy the sole and exclusive privilege granted to them, their heirs and assigns. In this they transcended their rights

under the terms of the grant. They claimed the right also to use the privilege to kill and take wild fowl at places not authorized by the grant. Some of the persons to whom the plaintiffs gave these permits not only claimed the right to hunt and shoot and roam where they pleased on the lands of the defendants, but in some instances behaved in a most impudent and insolent manner to those old people, upon whose land they had no right to be without their permission for any purpose whatever. In substance, the evidence is that they left the gates open, shot their guns off in the vicinity of the house and barn, sometimes hitting the cattle and frightening the stock; twice hitting and wounding a valuable shepherd dog, which finally had to be killed in consequence of the wounds thereof; roaming over the lands at their will; and in one instance, when ordered to leave the place, one of these persons threatening to have one of the defendants arrested; another telling her: "You have nothing to say about this place; it is none of your business; I got a permit in my pocket;" and much more of like character. Under this state of facts, is it surprising that the defendants were exasperated and resisted, and may we not suppose that, if the privilege granted had been used in conformity with its terms, the present misunderstanding might have been avoided? It may be admitted that the defendants have not been without fault; but have the plaintiffs been free from blame? We do not care to pursue the subject further.

Our opinion is, a case has not been made which would authorize the issuance of this extraordinary writ as prayed for, and that the decree must be reversed, and the bill dismissed; each party paying their own costs and disbursements.

Points-decided.

[Filed June 18, 1887.]

LAURA LAKIN, RESPONDENT, v. OREGON PACIFIC
RAILROAD COMPANY, APPELLANT.

RAILROAD COMPANY—RESPONSIBLE FOR ACTS OF ITS AGENTS, WHEN.—One Blackburn was employed by F., an employee of the defendant, to go upon an engine attached to a passenger train "to learn the road" to "Summit station with the regular engineer." At the Summit, B. was to take charge of the engine and then "receive his running orders." Before arriving at the Summit, the train being stopped, the engine was detached by one of the employees of the company, and without the regular engineer, the engine was taken to the Summit by B., accompanied by the brakeman of the engine and other servants of the company. In bringing the engine back, it ran into the train and caused the accident complained of. The company denied that F. had any authority to employ any one, and claimed that B. had no connection with the company. The plaintiff was a passenger on the train and was injured. *Held*, (1) That whether B. was legally employed or not, yet so long as he was acting in subordination to the agents of the company, and in the capacity of an employee, and the company through its regular agents acquiesced in it, the company was responsible for his acts while so employed. (2) That the contract of a railroad company is to safely carry people to their several destinations, and that to this end the company is liable for all the acts and omissions of its agents connected with, or in the line of their duty. That a distinction is to be made between the "scope of employment" of servants of the company, in its dealing with passengers, and the common-law rule as to the same subject in dealings with strangers. That the "scope of employment" of the servant of a railroad company in such cases is as broad as the contract with, and obligation to the passenger entered into and assumed by the company, and is not regulated by the *specified* duties of his employment. That if the engine was moved by employees of the company, though without the consent of the engineer, an instruction that "the company is liable for any damages that might arise from such moving, *whether within the scope of their employment or not*," was not error, although it was inaccurate.

EVIDENCE.—A defect of a car or an engine cannot be shown in an action where the damage is alleged to have accrued through the negligence of employees, and the defects of the engine or machinery are not relied upon as a cause of action. But there is no error committed where a witness, detailing the circumstances of the accident, testifies that the engine was "leaking steam," the jury having been instructed by the court to disregard that part of his evidence. That the judgment would not be reversed because a witness in describing the accident testified to the mode of arrangement of the seats upon a car, where such evidence is merely incidental to his description.

CONTRIBUTORY NEGLIGENCE.—It is not contributory negligence on the part of the plaintiff where she—the cars being stopped for dinner—alighted from the train and subsequently resumed her place without direction so to do from the train men, and was then injured by a collision of the engine with the cars.

APPEAL from Benton County. Affirmed.

L. Flinn, John Burnett, and J. R. Bryson, for Appellant.

Joshua J. Walton, and John Kelsay, for Respondent.

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Opinion of the Court—Thayer, J.

THAYER, J.—This appeal is from a judgment of the Circuit Court for the county of Benton, recovered in an action in said court, brought by the respondent against the appellant on account of damages for personal injuries received while a passenger upon the appellant's line of railroad, en route from Yaquina City to Corvallis, in said county, alleged to have been occasioned through the appellant's negligence. The case was tried in the Circuit Court by jury, and resulted in a verdict for the respondent for the sum of \$1,650. The grounds of the appeal are alleged errors in the rulings of the court made during the trial, and in the instructions given to the jury. The following is the gravamen of the complaint: "That while the plaintiff was such passenger at or near the station called 'The Summit,' on the line of said railroad, a collision occurred by running the engine or locomotive of said railroad against the passenger cars while said passenger cars were detached from said engine or locomotive, and while the said passenger cars were standing on the track of said railroad, with such force that the said plaintiff was precipitated forward and thrown down on said cars, whereby the plaintiff was badly wounded, bruised, and injured about her person, and put in imminent danger of her life; and plaintiff was for a long time confined, and unable to attend to her usual business, and is yet, and has sustained permanent injury, and was obliged to, and did, pay large sums of money for doctoring and attendance, to wit, the sum of three hundred dollars; that the said collision was caused by the negligence of the defendant and its servants." This was denied by the answer, and the following matter alleged therein: "That on the said thirty-first day of August, 1885, near the Summit station, on the railroad mentioned in the complaint, in Benton County, Oregon, the defendant was causing a train of cars to pass over said railroad from Yaquina City to Corvallis, Oregon, upon which train the plaintiff was a passenger, and that at said Summit station said train was halted and stopped for dinner, and that while said train was so stopped and halted to enable the passengers to get dinner at said Summit station, one C. E. Blackburn, who was at said time not in the service or employ of the defendant, wrongfully, and without the authority or con-

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sent of the defendant, detached, and caused the locomotive to be detached and uncoupled from the passenger cars, and moved said locomotive along the track some distance from said passenger cars, and that in attempting to return said locomotive to its place and connect the same to the said passenger cars the collision mentioned in the complaint happened, and not otherwise; and that the same happened without the consent or knowledge of the defendant or its servants, or either of them, and that said Blackburn, at said time, was not in the employ of the defendant, and never had been, and that his act in uncoupling said train and separating said locomotive from the passenger cars, and in attempting to return the same to its place, and in causing said collision, was without the knowledge or consent of the defendant, and the same was wrongful on the part of said Blackburn." The answer also alleged that plaintiff contributed to the alleged injury by leaving the cars of defendant while they were stopped, and returning to them while the engine was detached, without the knowledge of the defendant or its servants, and carelessly and negligently entered said cars before she was notified or requested so to do, and before the alleged collision occurred, and by so doing contributed to said injury, and that said alleged injury would not have occurred but for the said carelessness and negligence of said respondent.

This reference to the pleadings shows pretty conclusively that the relevant testimony in the case was confined to narrow limits. The general facts evidently are not controverted. It may reasonably be inferred from the pleadings that the respondent was a passenger upon the appellant's train of cars as alleged in the complaint; that the train stopped near the Summit station upon the line of the road; that the locomotive was there detached, and run out on the line of the road to a point beyond the Summit towards Corvallis, was then run back to be coupled to the passenger cars again, and, in the act of effecting such purpose, produced a collision which resulted in the injury of the respondent. It is claimed upon the part of the appellant, as will be seen from the portion of its answer, to which reference has been made, that it was in nowise responsible for the collision men-

tioned, but that it was produced by the wrongful intermeddling of said C. E. Blackburn with the company's locomotive engine and train of cars. The appellant denies any negligence in the affair, upon the grounds, I suppose, that the act was not its act, but the act of an interloper with whom the company had no relations whatever. This, and the alleged negligence of the respondent, seem to be the main grounds of the defense to the action. Both of the grounds were mainly matters of fact for the jury to determine. If the injury was occasioned by the wrongful acts of a stranger, the railroad company ought not to be held responsible for it, unless the company in some way countenanced the acts so as to make them its own. There was evidence in the case tending to show that said Blackburn was employed as engineer, and sent out on the train upon which the accident occurred by one Fordyce to learn the road between Yaquina City and the Summit.

Charles Meeker, the locomotive engineer on the train, testified that he got orders from the train dispatcher, Mr. Fordyce, to take Blackburn upon the engine "to learn him" the road between the two places; and Blackburn himself swore that he was sent out by Mr. Fordyce from Yaquina City as engineer at said time; that he supposed Mr. Fordyce to be acting as train dispatcher, or superintendent, or something of that kind, he did not know what; that at the time the instructions were given, Fordyce was at Yaquina City in the railroad office; that a great many persons were present at the time buying tickets; that Meeker was there. The instructions were that Blackburn should get on the engine No. 2 with Meeker, the engineer, and proceed to the Summit; that upon arriving at the Summit he was to take charge of No. 2 engine, and work with it there until Meeker returned from Corvallis; Meeker was to take another engine run by a man by the name of Brown, and proceed to Corvallis; that when he, Blackburn, arrived at the Summit, he would receive his running orders; that after receiving from Fordyce the instructions he got on the engine with Meeker. He further testified, in substance, that after getting upon the engine they left Yaquina, and ran along with the train to Chitwood water-tank; that after leaving there, Meeker asked him to

take the engine and run it; that he took hold of the engine, and Meeker went back on the train among the passengers; that after running along to within two or three miles of Nashville, Meeker came back, and he, Blackburn, asked him to take the engine; the former said: "No, you are doing well, go ahead." Meeker finally resumed running the train, and after they got to the Summit there was some conversation about dinner between Meeker, the fireman, and some one; that Meeker got off the car and mingled with the people, and he, Blackburn, remained on the engine some time; a few minutes after, a man he thought was Mr. Rader came upon the engine, and a little later the brakeman also came to the engine; that one of these men went along the engine, pulled the pin (coupling-pin), and gave witness the signal to go ahead; witness asked him, "where to," and he said, "to get dinner"; witness asked him if it was "all right with Charley," referring to Meeker, and he said: "Yes, Charley said go along and get dinner." He then came in the engine and passed through the pilot-hole, and as he went out he put his foot against the throttle and opened it; that witness took charge of the engine and went across the Summit for dinner. After dinner the parties started back with the engine to where the train was. The other parties had got aboard before witness did, and the engine was moving back when he returned to it from dinner; that when he got on the engine the fireman had charge of it, and he said: "You take charge of it while I put in some wood." That witness did so, and shut off steam; that they were backing up the engine, and, as customary, witness turned his back to the throttle to observe his way back; that he saw before going a great ways that the tender brake was not sufficient to hold the engine; that when he shut the steam off, he dropped the lever down into the corner, and controlled the engine with the lever until he got within a short distance of the train; that at times, in going down grade, the fireman would work his brake a little, and that would give the engine a little start, and witness would fetch it up with the lever again; but at no time till near the train did he have occasion to throw the lever over across the center; that by bringing the lever up

beyond the center it would have a tendency to keep the engine under control; when near the train, he saw the brakeman had worked round the tender ready to make the coupling; that he called out three cars, or four cars, he did not remember which; the engine was then under control; just as he called "three cars," or "four cars," witness was under the impression that the brake was let off; that at any rate the engine "shot right back on him"; that "any one who could handle an engine knows what that means"; that witness did not have the spring down into the notch; when the engine shot back on him it pulled him down into the corner; that he turned the other way and attempted to throw the lever over on the forward motion, and when he threw the lever up towards the center the engine was moving very fast; and when he brought the lever to the center he could not throw it over, and then discovered, through the cylinder-cocks, that "she" was leaking—could hear it sucking through the cylinder-cocks. This narration includes the circumstances immediately preceding the collision. There was a fireman, and, I would infer from the bill of exceptions, two brakemen aboard the engine at the time of the occurrence, though it is not certain that there was more than one of the latter.

Mr. Wallis Nash, a vice-president of the road, was called as a witness on the part of the appellant, and testified that the only one who had power to employ persons was Henry V. Gates; that the extent of Mr. Fordyce's authority was station agent at Yaquina, and that he was acting under Gates' authority as telegraph operator in carrying Gates' orders to the train men; that he had no other authority whatever over the men, except to execute Mr. Gates' orders.

Mr. Gates was also called as a witness for the appellant, and testified to the same effect, and further testified that Blackburn had no authority to go out on the train at the time referred to. The witness testified upon his cross-examination that Fordyce was the material agent; that as that agent he had charge of all supplies on the road; that he was station agent, and had a station agent's authority; outside of that he had no authority whatever; had no authority to employ any person.

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This in effect is all the evidence shown by the bill of exceptions as to Blackburn's connection with the affair, and his relation with the railroad company.

Upon the other ground of defense, the alleged contributory negligence upon the part of the respondent, the evidence contained in the bill of exceptions is very meager, and no statement is made in the bill of exceptions that there was evidence given upon that point that is not mentioned therein. Roy Rober, a witness on the part of the respondent, testified that he was upon the train at the time of the occurrence. In answer to a question as to what position on the car Mrs. Lakin was sitting at the time, he stated as follows: "I remember distinctly. She was sitting with her back partly to me, and sitting—the seats were with the backs together lengthwise in the cars—nearly to the end; perhaps eighteen inches, or perhaps two feet, from the end of the car. The benches stand that near to the end. She sat back from the end, I think at least four or five feet, with her back towards the bay from whence she came, her face towards the engine, and the child with its face towards the engine, and with its arms probably over the seat, and with its feet upon the seat, and in that position when it struck; because I noticed the engine when it struck, and she was thrown from there between the cars." The bill of exceptions contains the following: "The testimony in this case, in addition to that hereinbefore mentioned, tended to show that when the train stopped for dinner at the Summit that a portion of the passengers remained on the cars to eat lunch; that Mrs. Lakin so remained on the cars; that soon after the cars stopped she went off to take her little girl to a water-closet, and she was off about five minutes, and then she returned, and was eating her lunch when the accident occurred." The other evidence in the case showed that when the engine struck against the cars it was moving very fast, and that the concussion was severe. I do not see anything in the bill of exceptions that would have warranted the jury in finding that the respondent was guilty of contributory negligence in the affair. It does not even hint at any act or omission upon her part that concurred in producing the injury complained of. She paid her fare to

the said company, and took passage upon said train of cars, and was careful and prudent in her conduct, so far as anything to the contrary is shown. Nothing, therefore, can be claimed from that ground of defense.

As to the former ground, the injury being the result of the wrongful act of Blackburn and not from any negligence of the company, very little more can be claimed than from the latter. The evidence referred to tends to show that Blackburn was requested by Mr. Fordyce, the station agent of the company at Yaquina, to go aboard of the train and learn the route preparatory to his taking charge of the engine and operating it as engineer; that he did so; went in company with Meeker, the regular engineer, who was directed by said agent to teach him the road; that he was aboard the engine when it was detached from the train; went with it to where the employees of the railroad company took dinner, and returned upon it; that when it started back he was requested by the fireman to take charge of it, which he did, and in connection with the fireman and brakeman endeavored to manage the engine as it was backed down towards the train in order to be coupled onto it. It is conceded on the part of the appellant that Fordyce was in its employ, but it was claimed that the only one who had power to employ persons was Henry V. Gates; that the extent of Fordyce's authority was that of station agent at Yaquina, and he was also acting, under Gates' authority, as telegraph operator in carrying Gates' orders to the train men; that he had no authority whatever over the men except to execute Mr. Gates' orders. Granting that this was as claimed, and that Mr. Gates had not empowered Mr. Fordyce to employ Blackburn, or to direct Meeker to take him upon said train at the time mentioned, and yet I fail to see how that is to relieve the company from liability. Blackburn was aboard the engine, serving the company at the request and with the acquiescence of its servants and agents; and if the accident occurred through his special neglect or want of skill in the management of the engine, which does not appear at all, the company would be just as liable. Every employee of a railroad company is, to a limited extent, its agent; and what difference

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can it make whether the negligence which occasioned the injury resulted from the negligence or wrong of Blackburn, as *de jure* engineer, or from the negligence or wrong of Fordyce in placing him in the position of engineer? The latter was a regular employee of the company, and deputed to execute the orders of Gates. Blackburn evidently had no reason to believe but that Fordyce had been empowered to employ him, and his going aboard of the engine, and doing what the testimony tended to show he did do, was no intrusion. No one will pretend that it showed him to have been a trespasser in acting the part he did. Whether he was legally employed or not, so long as he acted in subordination to the agents of the company, the liability of the latter to the respondent was not affected. Its obligation to her was to carry her safely and properly; the mode of performance of its duty was through the means of agents and servants; and if it failed to fulfill its obligations in consequence of their wrong, it became responsible for the injury that was thereby occasioned. How is the public to know whether an engineer aboard a train of cars has been legally employed or not? or what difference does it make so long as he is there, acting in such capacity, and the company, through its regular agents and managers, acquiesces in it? The conductor is supposed to have been there, and he is said, by a great many authorities, to be *pro hac vice* the company. He must have countenanced all that Blackburn did up to the time of the collision. If the latter had forcibly taken possession of the engine and occasioned the collision, and the agents and employees of the company been unable to prevent it, the latter would not have been liable for the consequences. But no such an affair as that is shown by the facts, and we must conclude that the merits of the case are with the respondent, unless error crept into it through the admission of testimony, the rulings at the trial, or in the charge of the court to the jury.

The appellant has assigned numerous grounds of error. As classified under general heads, they consist in permitting the respondent, when on the stand as a witness, to describe the condition of the cars upon which the passengers were transported, and the manner in which she was injured; in admitting the tes-

timony of Blackburn as to the boiler leaking steam; and in returning the answer made to the inquiry of the jury, that "if the locomotive was moved by the servants or agents of the company, whether within the scope of their employment or not, the company is responsible for all their acts." The appellant's counsel claim that the evidence in regard to the condition of the cars, and of the boiler leaking steam, was objectionable, on the grounds that it tended to prove negligence on the part of the company in failing to provide suitable means of conveyance of passengers, and safe appliances and machinery, when those matters had not been counted on in the complaint. The allegation in the complaint is that the collision occurred by running the locomotive against the passenger car; "that said collision was caused by the negligence of the defendant and its servants." It is perhaps questionable whether the respondent had, under that allegation, the right to prove at the trial the unsuitability of the cars used by the appellant to transport passengers, or the defectiveness of the engine or boiler in the particular referred to, as a ground for a recovery in the action. It might reasonably be claimed that, by a fair construction of the complaint, the negligence alleged therein referred to some act or omission of the appellant's servants in the management of the engine at the time it was backed down to the passenger cars to be coupled to the train; but there certainly could have been no error in the respondent describing how the cars were constructed, in order to show the particular manner in which she had received the injury. I cannot see any objection to that, nor how the fact that the passengers were in an open car, with the seats arranged in a particular way, could have prejudiced the appellant with the jury, as its counsel seem to think it did. The respondent knew how the car was arranged when she went into it, and probably long before; and if she thought it was not such a one as the appellant ought to furnish, she would have objected to riding in it. Its defects were visible, if it had defects, and she took the risk incident thereto. The evidence in regard to "the steam escaping" came in incidentally in the testimony of Blackburn, as a part of his narrative of the affair; neither of these

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matters were sought to be made a ground of negligence, and the court instructed the jury especially not to consider the latter as such. I do not see how anything more could reasonably be claimed, and am satisfied that no error is shown from those matters.

The inquiry of the jury, to which the answer before referred to was given by the court, was whether, "in case the jury find that the employees of the company, that is, the fireman and brakeman, moved, or permitted the engine to be moved, without the consent of the engineer, the company was liable for any damages that might arise from such moving." The answer that the company, under the circumstances, was responsible for all their acts was correct. The court, however, to make it stronger, probably included in the answer the words, "whether within the scope of their employment or not." That left the inference that the fireman and brakeman might not have been acting within the scope of their employment, if they moved, or permitted the engine to be moved, without the consent of the engineer. If it were possible that the acts of the fireman and brakeman in the matter referred to could have been without the scope of their employment as it related to the respondent, the instruction would have been erroneous; and it was inaccurate as given under any view. The court, however, was entirely excusable in committing the inaccuracy, as there has been a contrariety of decisions upon the point that are calculated to confuse any one. But for a fireman, brakeman, or any other of the employees of a railroad company, having charge and management of a train of cars employed in transporting passengers from and to given places, to get out of the scope of their employment concerning such passengers, would be to get out of the employment of the company by dissolving their relations to it as servants. The error in attempting to excuse common carriers from liability on account of an injury resulting to a passenger has arisen from a misapplication of the old principle that the master is not liable for the malicious acts of his servant. When a servant goes outside of his employment, and wantonly inflicts an injury upon a third party to whom the master owes no duty, it may well be said that the servant was a principal in the affair; that

he was acting for himself in that matter, and was not a servant. But where the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master intrusts the performance of the duty he has so undertaken to discharge to his employees, he becomes responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with the master is absolved. The specified duty of an employee in such a case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed. The distinction here indicated, as to when the master is liable for the acts of his servant, has often been overlooked by both counsel and courts. The counsel in this case has cited a number of authorities, apparently without having observed it.

In *Jewell v. Grand Trunk Ry. Co.* 55 N. H. 84, the first case they cite, the defendant was under no obligations to the plaintiff; there, the plaintiff went to the defendant's depot to get certain freight, consisting in part of a crate of crockery; it was pointed out to him by Monneghan, the defendant's employee. Two men were at work for Monneghan in the company freight-house, assisted the plaintiff to load the freight, except the crate of crockery, upon his wagon. When it came to loading the crate of crockery, one of the men called upon Monneghan to assist in putting it upon the wagon. He did so, and, in loading it, injured the plaintiff in consequence of the crate striking against his shoulder, and for which the action was brought against the company. *Held*, that if the consignee of goods accepts a delivery at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work. It was upon that principle that the new trial was granted in the case, the trial court having refused an instruction prayed by the defendant's counsel covering it. The gist of the decision is that pointing out the freight to the plaintiff in the freight-house,

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and his accepting it there, ended the defendant's obligation to the consignee, and what Monneghan and the other persons did in loading it upon the plaintiff's wagon was beyond the scope of their employment, simply because it was an act the company had not contracted to do. Its service was completed when the freight was delivered, either in the freight-house or elsewhere, and when its employee undertook to do something beyond that, he got outside of the course of his employment.

In the case of *Little M. R. R. Co. v. Wetmore*, 19 Ohio St. 110, cited by appellant's counsel, the distinction in question was only referred to. The court said, at page 133 of the case, that, "in order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose, and as the only means of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were engaged in transacting the business. Whether this position is tenable, we do not find it necessary in the decision of the case now before us to express a definite opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here. But if such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself towards the servant as not, by misbehavior, to provoke a personal quarrel between them." The court concluded that "the evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel, and that the blow was inflicted by the servant as an act of personal resentment." And that "if these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the services for which he was engaged by the master."

Isaac v. Third Avenue R. R. 12 Daly, 340, another case cited, seems to be in line with that of *Little M. R. R. v. Wetmore*, though I believe the distinction alluded to was there entirely overlooked, although the defendant in the case was under an obligation to the plaintiff, she being a passenger upon the street railroad car, and its servant, the conductor thereof, having thrown her from the car with great violence out upon the pavement, whereby she was seriously injured. The other authorities cited by said counsel are cases where the master owed no special duty to the party injured by the servant's act. The decisions in the Ohio and New York cases above referred to would have been entirely sound, no doubt, if the obligation the defendant in each of the cases was under to the plaintiff therein, before suggested, had not existed. But in view of such obligations I am unable to discover how a common carrier of passengers is exempted from liability for the misuse occasioned by the parties designated by the carrier to perform the latter's duty in transporting such passengers, whether it result from the malice and violence, or ordinary negligence, of such parties.

I indorse fully the language of Chief Justice Ryan in *Craker v. Chicago & N. W. R. R. Co.* 36 Wis. 669, where, after referring to the liability of principals for wilful and malicious acts of agents, he says: "But we need not pursue the subject, for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard or in the malicious violation of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third person without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and he appoint an agent to furnish it, and the agent, of malice, furnish

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a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

The same doctrine is maintained in *Goddard v. Grand Trunk Ry. Co.* 57 Me. 202, and is there supported by citations to a large number of authorities; and this court, in *Sullivan v. Oregon Railway & Nav. Co.* 12 Or. 405, indorsed it. The fireman and brakeman, if they moved the engine, or permitted it to be moved, without the consent of the engineer, were still within the scope of their employment. At least the company was responsible for any consequences attending the affair, occasioned by their negligence or that of any person permitted to be on the engine assisting in its management; and therefore the remark of the judge, "whether within the scope of their employment or not," could have done no injury.

As to whether there was negligence or not in detaching the engine from the train, running it over the Summit, and backing it down to the train in the manner shown by the testimony given at the trial, was a question for the jury. Under the facts shown, I think the jury were authorized in finding negligence, and that the judgment appealed from should be affirmed.

Having been of counsel, STRAHAN, J., took no part in the hearing or deliberations in this case.

On petition for rehearing.

THAYER, J.—I have examined the petition for a rehearing filed herein, and am unable to discover therefrom any good reason for changing the former opinion expressed in this case. The petition, in fact, is but an extended argument upon the questions already considered, and I would deem it unnecessary to indicate any further view, were it not for certain language which appears in the petition, of which the following is a copy: "If the principles are to be applied to the extent indicated in the opinion, they carry the law of agency to the extent not heretofore enforced or declared in any case within our knowledge, and which, as it

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seems to us, must tend to a very great extent to render the transactions of business by means of agents impracticable, for the reason that under the doctrine of this case the master or principal is rendered powerless, he is at the mercy of his employees, who may, as *his agent*, but without his authority, or knowledge, or consent, by leaving the line of their employment, do wrongful acts enough to bring bankruptcy and ruin to the master or principal."

I supposed the position of the court would be understood, from what has been already announced as its views upon that question; but counsel seem to overlook the principle upon which the opinion was based. It is simply this: A common carrier of passengers undertakes to transport them safely and with reasonable dispatch. That is an obligation the common carrier takes upon himself, or itself, when he or it engages to carry passengers *for hire*. If that obligation is broken, the carrier is liable, whether the breach results from the negligence, misconduct, or malice of the persons the carrier employs to perform the obligation.

The question whether the agent kept within the line of his duty, or got out of it, is unimportant. A conductor, brakeman, or other employee upon a passenger train of cars, is employed to perform certain duties; but whether he keep within the line of his duty or not has nothing to do with the company's liability to a passenger, if injured through the fault of such employee.

A railroad engineer would have no right to get drunk, or act recklessly or maliciously while running a train of cars. If he did so, he might be said, in one sense, to be outside of his line of duty; but who would undertake to exonerate the company from liability for an injury to a passenger occasioned by any such acts? A person who takes passage upon a train of cars contracts with the company that he shall receive good treatment while in transit. Under such circumstances, could it reasonably be contended that the company would not be liable, if its agents or servants were wantonly to inflict abuse upon such passenger? No court would stop to inquire whether the agent or employee was outside of his line of duty or not; it would make no difference whether he acted from honest motives or maliciously; the

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effect would be the same. The obligation of the company would be violated, and its liability attach. So with the obligation to transport passengers safely. It may be violated as well by the malicious acts as the negligent acts of its employees, and the question of their being within or beyond their line of duty in such cases cannot be considered.

The rule is different, of course, where the act of the agent affects a party to whom the company owes no duty. There the character of the act, as to its being negligent or malicious, becomes important. That a master is not ordinarily liable for the malicious acts of his servant is an old and well-settled principle, and the reason of the rule is that the servant becomes a principal when he commits such acts; he is then outside of his line of duty. But in a case like the one under consideration, the master cannot shield himself from liability upon any such grounds. The liability there arises out of another principle, which was attempted to be explained in the opinion delivered.

The exception to the proof as to the kind of car the respondent was in when the collision occurred between the cars and engine is insisted upon as error with more pertinacity than consideration. The point is merely technical at most. If the position of the appellant's counsel were correct, they have very little to complain about. They were certainly not taken by surprise in the proof; it was not a matter that could be sprung upon them and they not prepared to meet. The proof related to an open, visible, notorious fact, which they were as well prepared to disprove, no doubt, at one time as another. How could it have been important to apprise the appellant that the respondent would prove the style and arrangement of the car. The former knew that it was an open car, that the seats were arranged lengthwise, and that the ends were entirely open; or if that were not the fact, they could have disproved it by its employees who had control of the car, and by hundreds of others upon very short notice. The fact was of such a character that the appellant could not have been misled in consequence of the proof. The counsel for the appellant seem to think that it was entitled to all the immunity of a prisoner under indictment. The claim that this

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proof tended to establish another and different ground of liability, to my mind, is wholly absurd. Proving the mode in which the car was constructed established no liability. The appellant had a legal right to run cars of that character upon its road, and the respondent took all the risk incident thereto when she engaged passage upon them. It is not like a case where cars are defective and occasion a casualty in consequence thereof; they were perfect as designed. If the respondent had engaged passage in a closed car, an ordinary passenger coach, and the company had placed her in an open flat car, there might have been grounds for liability in case of accident. Using such kind of car under the circumstances this one was employed did not, however, create any liability, and the fact as to its mode of construction and arrangement was only important as an effect, and not as a cause. Its proof was competent in order to show how the injury was received, and to disprove the charge of contributory negligence, and it evidently was admitted upon that ground.

There are no sufficient grounds for a rehearing, and the motion will therefore be denied.

[Filed June 18, 1887.]

STATE OF OREGON, RESPONDENT, v. E. M. CLEMENTS,
APPELLANT.

PRACTICE—CRIMINAL LAW—PREJUDICIAL REMARKS OF JUDGE AT THE TRIAL.—

On the trial of a physician for manslaughter caused by producing an abortion, which resulted in the death of the mother, the State offered to prove by a witness who was a cook by occupation that the deceased was pregnant. It was objected that the witness was incompetent. The court in overruling the objection said: "Anybody can tell whether a woman is pregnant or not at times by her looks, from common observation. There is a great deal of humbug about medical science . . . and medical testimony. . . . There is many a man practicing medicine who ought to be second-class cook in a third-class hotel." *Held*, prejudicial to defendant, and ground for new trial.

MANSLAUGHTER BY ABORTION—BURDEN OF PROOF.—The burden of proof is on the State in such cases to prove that the abortion was not necessary to preserve the life of the mother. *Seemle*, that this is especially the case where the accused is a practicing physician.

EVIDENCE.—Proof that the deceased said to witness the day before she died that "the doctor had used instruments upon her" is only hearsay evidence, and inadmissible.

15 237
19 71
19 442
14* 410
23* 816
24* 406

15 237
23 319
24 70
24 174
14* 410
32* 1034
33* 540
15 237
29 511
15 237
30 24
15 237
33 159

Argument for Appellant.

BILL OF EXCEPTIONS.—In order to receive consideration in this court the bill of exceptions must contain a general statement of the proceedings, a statement of the exceptions as taken and allowed, and enough of the testimony bearing upon the point to make the same significant. Detached memoranda signed by and in the handwriting of the judge does not fill the requirements of the statute.

VERDICT—MOTION TO SET ASIDE.—The order of the trial court refusing to set aside the verdict of a jury will not be reviewed by the appellate court. The errors relied upon must be raised by appropriate exceptions interposed on the trial.

APPEAL from Baker County.

Olmstead & Anderson, and *J. P. Rand*, for Appellant.

The statement of deceased that the defendant had used instruments on her was inadmissible; not a dying declaration. (See *People v. Lee*, 17 Cal. 76; *People v. Vincent*, 24 Cal. 17; *State v. Garrand*, 5 Or. 216; *Vass v. Commonw.* 3 Leigh, 786; 24 Am. Dec. 695; *Anthony v. State*, Meigs, 265; 33 Am. Dec. 143; *Dunn v. State*, 2 Ark. 229; 35 Am. Dec. 54; *McDaniel v. State*, 8 Smedes & M. 401; 47 Am. Dec. 93; *The People v. Perry*, 8 Abb. Pr. N. S. 27; Wharton's Criminal Evidence, 281; 1 Greenleaf on Evidence, § 158.)

Not a part of the *res gestæ*. (See *Batton v. Watson*, 13 Ga. 63; *State v. Davidson*, 30 Vt. 377; *State v. Davis*, 56 N. Y. 95; *State v. Garrand*, 5 Or. 216; 1 Greenleaf on Evidence, § 110; Wharton's Criminal Evidence, § 296, and notes; *Insurance Co. v. Mosley*, 8 Wall. 397; *State v. Curtis*, 70 Mo. 694; *People v. McLaughlin*, 44 Cal. 435; *State v. Daugherty*, 17 Nev. 376; *Sullivan v. O. R. & N. Co.* 12 Or. 395; Wharton on Homicide, § 262, and note; *State v. Rowles*, 65 N. C. 334.)

The language of the court in regard to many a man being a physician who ought to be a cook, etc., was ground for reversal. (*Andrews v. Ketchens*, 77 Ill. 377; *Furnam v. Huntsville*, 54 Ala. 263; *Hair v. Little*, 28 Ala. 236; *Reiger v. Davis*, 67 N. C. 185; *State v. Simmons*, 6 Jones, 121.)

The court erred in its instructions relating to the weight to be given defendant's testimony. The power of jurors to judge of the credibility of a witness is to be exercised according to law. (Code, 275; T. 9, ch. 9.)

It was not necessary for defendant to prove that the act com-

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mitted was necessary to save the life of the mother. (1 Greenleaf on Evidence, § 35; *Commonw. v. McKie*, 1 Gray, 61; *Ogletree v. State*, 28 Ala. 693; 1 Bishop's Criminal Procedure, §§ 1050, 1051; Bennett & Hurd's Leading Cases, 356; *Commonw. v. Kimball*, 24 Pick. 366; *Morehead v. State*, 34 Ohio St. 212; *Otto v. State*, 7 Tex. 44; 29 Mo. 259.)

M. D. Olifford, and *Ramsey & Bingham*, for Respondent.

In the absence of a denial in the record, and there appearing to have been evidence not set out in the record, it is to be presumed that a proper foundation was laid for the admission of the declaration of deceased. (*Keating v. State*, 44 Ind. 450; *Parker v. Monteith*, 7 Or. 277; *State v. Ducker*, 8 Or. 394; *State v. Ah Lee*, 7 Or. 258.)

The declaration was admissible as a part of the *res gestæ*. (*Hunter v. State* 40 N. J. L. 495; *Lamport v. The People*, 29 Mich. 71; *Driscoll v. The People*, 47 Mich. 413; *Commonw. v. Pike*, 3 Cush. 81; Wharton's Criminal Evidence, § 263; 9 Rip. 289.)

It did not prejudice defendant, as he testified to the same fact.

THAYER, J.—The appellant herein was indicted, tried, and convicted, in the Circuit Court for the county of Baker, of the crime of manslaughter, alleged to have been committed by producing an abortion upon one Lena Dakota, from the effects of which she died on the thirty-first day of August, 1886, at Huntington, in said Baker County. The deceased was a young unmarried woman; had been stopping for some little time at the hotel at Huntington; was taken violently sick a few days before her death, and died evidently of hemorrhage from the *uterus*, caused by the recent expulsion of a *fœtus*. The appellant was a practicing physician at Huntington, and as such was treating the deceased at the time of her death. On the morning of her death he locked the door of her room, passed out from the hotel, and remarked to some one that she was sleeping quietly, and that he did not want her disturbed. A few hours afterwards, about 9 o'clock A. M., he came back to the hotel, called some one from the door

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of her room, and stated that "Lena was dying." He was immediately arrested, placed in irons, and put in charge of the constable, and on his way from the hotel, stated to the constable in charge to come with him to his office; that he had something to show him. They proceeded to the prisoner's room, where he exhibited to the constable a *fetus*, of which he said the deceased had been delivered. The appellant, at about the time the deceased was first taken ill, exhibited in the drug store to the druggist, a stout sharpened quill, about six inches in length, being bloody, and having the appearance of having been recently imbedded in living animal tissues, which he claimed to have taken from her room, and stated to the druggist: "I want you to examine this. I may need it for my protection. I am afraid this case will get me into a scrape yet. Some woman has been using this for a criminal purpose." A *post mortem* examination was held, and it was found that there was some abrasion of the interior walls of the *uterus*, or scratching, apparently caused by some rough instrument, but that the injuries were slight. In the room of the deceased were also found numerous drugs, some bearing marks of "druggist's prescriptions of Kansas, Mo.," others from druggists in Idaho Territory, and others prescribed by the appellant, the latter being only such prescriptions as would be used in ordinary obstetrical cases. There was no indication of deceased having met her death by abortion produced by the use of drugs.

John Williams (colored) was called and sworn on behalf of the State, and testified as follows: "Was in Huntington, August 31, 1886. Been there ever since. Was first cook in the hotel at Huntington. I knew the deceased while she was at the hotel. She died August 31st of this year. I last saw deceased alive on Monday before her death, about 4:30 o'clock. She was lying upon the floor. Appeared to be very sick. I had brought her some lemonade. Asked her what was the matter with her. I said to her, 'You are a very sick woman.' The boy was coming up with some ice-water. The door was open. She raised her head, and I asked her what was the matter. She said she was sick at her stomach. I says, 'Yes, Lena; you are a very

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sick woman.' I picked her up, and laid her on the bed. Asked her if I had not better telegraph to Baker for a doctor. She said, 'No; Johnny would be in in the morning, and he could send to Wood River for a physician.'” He was then asked the following question by counsel for the State: “What did she say was the matter with her?” The witness in answer thereto said: “I asked her if the doctor had used instruments on her.” The appellant’s counsel thereupon duly objected to the witness answering the question. The court ruled that the question might be answered, if the State would connect the statement of the deceased with some act of the appellant with the commission of the crime. Subsequently said witness was recalled by the State, and asked the following question: “State what, if anything, she [referring to the deceased] said about having instruments used upon her [referring to the time mentioned in his former testimony]?” The appellant’s counsel objected to the question as irrelevant, immaterial, and incompetent; that no foundation had been laid for introducing the same, either as a part of the *res gestæ*, or as a dying declaration. The court overruled the objection, to which an exception was allowed, and the witness answered: “I asked her if the doctor had used instruments upon her. She said, ‘Yes.’” It appears, also, that appellant, during the time he attended on the deceased, misrepresented the cause of her illness.

This seems to be the substance, so far as I can gather from counsel’s briefs, of the proof upon the part of the State.

The appellant was a witness in his own behalf, and testified that the deceased applied to him on the 12th of August, 1886, to perform an abortion on her; that he refused absolutely to do it, and gave his reasons. He also testified that some ten or twelve days prior to the death of the deceased she called upon him to treat her professionally, for some derangement of the *uterus*; that he made an examination, found a sponge imbedded in the tissues in the mouth of the womb; that he used a metallic *speculum* and forceps, and removed the sponge; that he found the place occupied by the sponge lacerated, the sponge covered with pus, and very offensive; that he treated her

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for about six days, and dismissed the case; that he saw nothing more of deceased until the 25th of August; that he was then called by her; that she complained of nausea of the stomach, and pains in the abdomen, and upon being questioned, denied having made any attempt of abortion; that symptoms rapidly disclosed themselves indicating labor pains; that he prescribed an anti-abortive treatment; that there were no other physicians in reach with whom to consult, and deceased had no means to employ medical assistance; that he continued such treatment; that deceased also informed him that she had made an attempt to accomplish a miscarriage by inserting a quill into the *uterus*, and told him where the quill could be found, and which was shown to be the same quill before referred to; that thereafter, on the night of the 30th of August, deceased gave birth to a dead *fœtus*; that for a considerable time prior to this the deceased was in such a condition that to have exposed the cause of her illness would have resulted in a nervous shock extremely dangerous to her life; that appellant removed the *fœtus*, and its appendages, and afterwards surrendered them to the officer, as shown on the part of the State; that he administered opiates to the deceased, placed her in bed for the purpose of her securing repose, gave directions that she should not be disturbed, left the hotel, and went to his breakfast. Upon his return, in about an hour afterwards, found her dying, uterine hemorrhage having set in during his absence, and caused her death.

The appellant assigns a number of grounds of error, which counsel have discussed fully. They relate to the insufficiency of the indictment, the introduction of improper testimony at the trial, misconduct of the judge in making an improper remark during the trial prejudicial to the appellant, in giving improper instructions to the jury, and in refusing instructions asked by the appellant's counsel, in denying the appellant's motion to set aside the verdict, and in refusing testimony offered by appellant's counsel at the trial.

The one relating to the insufficiency of the indictment was passed over at the hearing without argument; and the one deny-

ing the motion to set aside the verdict we cannot consider upon this appeal.

Motion to set aside the verdict. This court long ago held that a matter of that character is not reviewable. Counsel, however, continue, from time to time, to persist in urging such questions upon the consideration of this court, and seem to think that, unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient in law to justify its rendition, if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground, and including all the evidence in the bill of exceptions tending to establish his guilt. So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here; but it must be raised by an exception at the trial. Should the trial court say to the jury that if they found such and such facts, and there was no sufficient evidence in law to authorize such finding of all or any one of the facts thus submitted, an exception in either case could be saved, and made available. All the evidence, however, would have to be certified to this court, bearing upon the same, in the statement of the exception; and the statement in such case must purport to contain all the evidence upon the point. This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such.

In the shape the evidence in this case is, we cannot determine its sufficiency. I have only attempted to set out the appellant's testimony from what appears in his brief. That is doubtless stated as favorably to him as the facts will permit, and yet I would not undertake to decide therefrom that he was not guilty as charged in the indictment, though he may have been entirely innocent. Very much would depend upon the character and standing, in such a case, of the accused. There appears to have been no improper motive upon the part of the

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appellant to produce an abortion upon Lena Dakota, unless it were actuated by sympathy for that unfortunate girl. Her anxiety to cover up her shame would be likely to have had an influence upon any one possessed of a sympathetic nature. She had been imprudent, but was not outside of the pale of charity, and yet could not hope for it in the eyes of mankind, especially in those of her own sex. But whether the appellant was guilty or not, no one can determine so well as those acquainted with the surroundings. It would be idle for this court to attempt to speculate upon this question. The verdict of the jury must therefore stand, unless error was committed at the trial.

Improper remark of judge at the trial constituting error. The remark of the judge at the trial, claimed to have been prejudicial to the appellant, was made in a ruling upon an objection to a question to the witness Williams. Counsel for the State asked the witness, concerning the deceased, whether she was in a family way. The appellant's counsel objected to it, upon the grounds that the witness was not competent to give an opinion; that it did not appear that he possessed any scientific knowledge; that he was only a second cook at the Pacific Hotel. The court overruled the objection, and in doing so made use of the following language: "Anybody is competent to tell whether a woman is pregnant or not, at certain stages and times, by her looks, from common observation. There is a great deal of humbug about medical science, and medical experts, and medical testimony, and so-called medical scientific opinion. There is no other profession where there is such a difference, or where such testimony is unsettled and unsatisfactory as medical experts, and there is many a man practicing medicine who ought to be 'second-class cook' in a third-class hotel."

The remark evidently was an honest expression of the judge's opinion upon the question, and, as a general proposition, may have the sanction of many of the legal profession; yet it was unfortunate that the learned judge made it under the circumstances. The last sentence, "there is many a man practicing medicine who ought to be 'second-class cook' in a third-class hotel," was particularly calculated to prejudice the appellant in

the minds of the jury. It could hardly have failed to turn their attention directly towards him, and suggest to them the thought, at least, that he belonged to the class the judge alluded to. The latter, I am satisfied, had no intention whatever to convey any such impression. It was a hasty, inconsiderate remark, however, and should not have been made. If there is any one virtue in the judicial mind entitled to superior excellence, it is patience to hear and determine matters involving the rights and liberties of those charged with the commission of a crime. It is the highest aim of the courts to insure parties arraigned at the bar of justice a fair and impartial trial, and to avoid the least semblance indicating that the prosecution is maintained through a spirit of vindictiveness. The Supreme Court of the United States has ever sedulously guarded against any appearance of passion or impatience in its administration of the law. If such a course is the best and wisest for an appellate court to pursue, how much more important is it that a *nisi prius* court should observe it. The latter is often convened to try cases of highly sensational character, in the vicinity of where they arise, and in which the tone and sentiment of the community are inflamed by excitement and prejudice. Hence the least encouragement upon the part of the presiding judge would pervert the affair from an investigation to ascertain truth into a scene of persecution. The remark may have had no injurious effect in the case under consideration; but the matter is too serious to be passed over without an expression of disapprobation. I do not think that the question put to the witness was necessarily improper, nor do I find that the witness attempted to answer it; and if the court, after ascertaining that he had sufficient knowledge to answer it, had quietly overruled the objection, there would have been nothing upon that point of which the appellant could have complained, but in the shape it comes here we can do no less than reverse the judgment of conviction.

The other assignments of error might be passed over without further notice, were it not that the case has to be sent back for a new trial.

Bill of exceptions. The counsel for the State contended at the

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hearing that there was no such bill of exceptions in the transcript as would admit of any examination by this court of many of the questions which the appellant's counsel brought forward, and from what I have seen of the record I am inclined to believe that he is correct. It is very doubtful, to say the least, whether the alleged instructions of the court to the jury, and the exceptions thereto, are authenticated in such manner as to entitle them to a consideration in an appellate court. The alleged instructions are on separate sheets from the bill of exceptions. They purport to be the instructions of the court to the jury, and are signed by the judge. But there is nothing to indicate the exceptions thereto, aside from a note upon the margin. The words "excepted to" are there written, and in many instances the name of the judge is appended to it. The practice, in regard to making up a bill of exceptions, ought to be thoroughly understood in this State. There has usually been but one course pursued regarding it ever since there has been an organized judiciary here; and that has been to make one general statement, reciting the general proceedings of the trial, a statement of the exceptions as they occurred, with sufficient of the evidence or other matter to explain them. That course must still be observed, unless changed by the legislature. It will not do for counsel to have transmitted here mere memoranda, in detached parts, of the proceedings had in a case, and expect that this court will consider the matter. Everything occurring in the trial of a lawsuit, from the time of the calling of the jury till the rendition of their verdict, upon which questions of law arise that are desired to be reviewed, should be embodied in one bill of exceptions. Exhibits have been allowed to be referred to in the bill, and copies thereof attached, but that has led to controversy in consequence of the exhibit having, as is alleged, been detached after the bill was signed. It is much the better practice, where it can be done, to set out all such matters in the bill itself, and that prevents any such consequences as referred to. Counsel, of course, should use judgment in making up a bill of exceptions, so as not to load it down with immaterial matter, or unnecessary portions of the testimony. A little judicious care

and discrimination and wholesome industry upon the part of counsel in this matter will save this court from a great deal of annoyance, and avoid a prejudice which an awkward, unwieldy performance is liable to incite.

The instructions given by the court to the jury in this case, as shown by the paper referred to, were very extensive and minute. I think it would be less liable to confuse a jury, in such a case, to submit to them simply the question as to whether the evidence adduced proved, beyond a reasonable doubt, that the accused was guilty of the offense charged in the indictment. He was charged with having done an act forbidden by section 513 of the Criminal Code of the State, which provides that "if any person shall administer, to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." The gravamen of the offense is the employment of means, with intent thereby to destroy the child; that the death of the child or the mother is thereby produced; that the same is not necessary to preserve the life of the mother. The act then is manslaughter. It was necessary, therefore, for the State, in the present case, before it could claim a conviction of the appellant, to prove that said Lena Dakota was pregnant; that the appellant employed means with intent thereby to destroy the child with which she was pregnant; that the death of said Lena was thereby produced; and that the employment of the means to destroy the child was not necessary to preserve her life. The counsel for the State contended at the hearing that the *onus* is upon the accused, in such cases, to prove that it was necessary to employ the means to destroy the child in order to save the life of the mother, after the State has proved the other facts referred to; that it involves a matter peculiarly within the knowledge of the accused; and that the averment of the fact will be taken as true, unless he disprove it. There are a class of cases where a rule of that character has been made applicable. It has

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been applied in civil and criminal prosecutions, for a penalty for doing an act which the statute only permits to be done by persons duly licensed therefor. (1 Greenleaf on Evidence, § 79.) But I think it doubtful whether any such rule should obtain in such cases. I am unable to discover any principle to found it upon. The relative convenience of the parties to make the proof ought not, it seems to me, to be taken into consideration; but, in any event, no such rule should be applied to a criminal case, where the accused is presumed to be innocent, and the prosecution is required to prove him guilty beyond a reasonable doubt. In fact, I do not see how such a rule could obtain in such a case without overthrowing the two eternal principles of the common law just referred to. Proof that a physician, in his professional treatment of a woman pregnant with a child, had used means, with the intent thereby to destroy the child, and the death of the child was thereby produced, is not evidence that the treatment was not necessary to preserve the life of the mother; nor, if it produced the death of the mother, that it was not an honest effort on the part of the physician to preserve her life. The experience of mankind shows that cases have often arisen in which such treatment has necessarily been resorted to, and, in the absence of other proof, the law, in its benignity, would presume that it was performed in good faith, and for a legitimate purpose. The extent of proof, to establish the negative averment in such a case, would necessarily be limited by the circumstances. It could not, in the nature of things, be made positive, except as aided by the fact that the accused was able to refute it absolutely, if untrue, and had failed to attempt to do so.

In section 78 of 1 Greenleaf on Evidence, the author says: "So, in a prosecution for a penalty given by statute, if the statute, in describing the offense, contains negative matter, the count must contain such negative allegation, and it must be supported by *prima facie* proof. Such is the case in prosecutions for penalties given by statute for coursing deer in enclosed grounds, not having the consent of the owner; or for cutting trees on lands not the parties' own; or taking other property, not having the consent of the owner; or for selling, as a ped-

dler, goods not of the produce or manufacture of the country; or for neglecting to prove a will without just excuse made and accepted by the judge of the probate therefor. In these, and the like cases, it is obvious that plenary proof on the part of the affirmant can hardly be expected; and therefore it is considered sufficient if he offer such evidence as, in the absence of counter-testimony, would afford ground for presuming that the allegation is true."

It seems to me that, upon principle and authority, the accused, in such a case, has the right to stand upon his plea of "not guilty"; and that the prosecution is required to prove every charge in the indictment constituting the offense, including allegations of negative matter, before a conviction can properly be claimed.

Statements of the deceased hearsay. The testimony of the witness Williams, as to what the deceased told him about the doctor having used instruments upon her, was mere hearsay, was clearly inadmissible, and the court should have excluded it at once.

The defendant a witness. The attention of the court was directed at the hearing to the instructions of the Circuit Court to the jury, regarding the effect to be given to the testimony of the appellant. We should not consider the point if the case were not going back for a new trial, and some question liable to arise thereon. Under the circumstances, we deem it a duty to suggest our view concerning the matter. The act of the legislative assembly of the State, passed in 1880, amending sections 166 and 167 of the Criminal Code, provides that a person charged or accused of a crime shall, as his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The point referred to involves the question as to what extent the court is authorized to instruct the jury under that provision of the statute. Section 835 of the Civil Code provides that the jury, subject to the control of the court, in the cases specified in that Code, are judges of the effect or value of evidence addressed to them, except where it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper

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occasions. There are other provisions of the Civil Code which allow the credibility of a witness, who has an interest in the event of the suit, to be drawn in question. Section 699 of that Code, in connection with section 673 thereof, permits it. Section 165 of the Criminal Code provides that the law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in that Code. Taking these various sections together, the court is of the opinion that the Circuit Court in such a case is authorized to instruct on the matters, as far as applicable, referred to in section 835 of the Civil Code; also that the witness is presumed to speak the truth, but that such presumption may be overcome by the manner in which he testifies; by the character of his testimony; by evidence affecting his character or motive; by contradictory evidence; or by his having an interest in the event of the prosecution, the jury to be the exclusive judges of his credibility. The witness, being also the party accused, is not entitled to full credit; but the jury have no right, on that account, to arbitrarily disregard his evidence. The manner in which he testifies may be such as to impress every one with the belief of the truth of what he states. A case came under my own observation once where a party charged with the commission of an offense pleaded guilty to it, and upon being asked the usual preliminary question to his being sentenced, "what he had to say why the sentence of the law should not be pronounced upon him," etc., made such a candid, ingenious statement in response that the court declined to sentence him, and directed that his plea be withdrawn, and a plea of not guilty be entered, and he was subsequently acquitted upon the latter plea. In that case, however, the judge was a practical man, and would not subordinate his sense of justice and humanity to vain austerity; or believe that courts for the trial of criminal causes were organized only to convict the accused.

The judgment appealed from will be reversed, and the case remanded to the Circuit Court for a new trial.

Argument for Appellants.

[Filed June 13, 1887.]

JOHN HOBSON ET AL., RESPONDENTS, v. THOMAS MONTEITH ET AL., APPELLANTS.

TOWN PLAT.—One McClure, in 1847, laid out the town site of Astoria, establishing therein a street known as "Hamilton Street." Subsequently, Cyrus Olney, having bought the land, prepared and had recorded a second map of said town known as "the plat or map of McClure's Astoria, as extended by Cyrus Olney." By said map, Hamilton Street was abolished and laid out as lots. Prior to the making of the latter map, Olney sold to one Monteith certain blocks described and numbered in the McClure map, which adjoined the said Hamilton Street. Upon a suit brought to enjoin the erection of buildings upon Hamilton Street by grantees of Olney; *held* (1) That the effect of the map or plat must be determined from the map itself, and oral testimony cannot be introduced to show any intent on the part of Olney when he made it. (2) That whether a change in the original plat of the town of Astoria, or simply an extension of the town was made by Olney's map, must be determined by an examination of the map, not from the name given it. (3) That at the time the plat was made the title to the land lying between high and low-water mark was in the State, and no one had any right in it to convey, though the riparian owner might, so far as he himself was concerned, dedicate it as a street, and so conduct himself as to be estopped from denying the dedication. (4) That the act of the legislature granting the fee of the streets in Astoria to the city only contemplated such streets as were in existence, not such as had been vacated.

APPEAL from Clatsop County. Reversed.

Williams, Durham & Thompson, C. H. Page, and J. Q. A. Bowlby, for Appellants.

The map of McClure is a nullity, in so far as it attempts to dedicate land between high and low-water mark. (*Heiple v. City of E. P.* 13 Or. 103; *Hinnan v. Warren*, 6 Or. 408.)

When Olney made his maps, no lots or blocks had been sold according to the McClure plat except to Monteith, and no acceptance of the street had ever been made by the public, and Olney had the right to make the map he did. (*Holdane v. Cold Spring*, 21 N. Y. 474.)

No claim can be made on behalf of the city, as the city authorities have treated and taxed the lots as the property of Monteith, and thereby recognized the Olney plat. (*Bell v. Burlington*, 27 N. W. Rep. 245.)

Plaintiffs cannot attack the legality or effect of the Olney map, because they and their grantors purchased and took their deeds

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according to its plans and descriptions. (Code, 278; *Morgan v. Moore*, 3 Gray, 319; *Carver v. Jackson*, 4 Peters, 85; *Crane v. Morris*, 6 Peters, 598; *Chapman v. Pollock*, 11 Pac. Rep. 768; 1 Greenleaf on Evidence, § 23.)

Fulton Bros., and *Stott, Waldo, Smith & Boise*, for Respondents.

If McClure had a right to lay out a street, it could only be vacated by proceedings in accordance with statute. (Code, pp. 777, 778.)

Acceptance by a city is not necessary to perfect a dedication of a street. (*Grogan v. Hayard*, 4 Fed. Rep. 165; *Dillon on Municipal Corporations*, § 505.)

The town site laid out by McClure was partly on tide-land, and the street in question was tide-land.

THAYER, J.—The respondents herein brought suit in the Circuit Court of Clatsop County, to restrain the appellants from building upon a certain strip of land alleged to be one of the streets in the city of Astoria, which they designate as “Hamilton Street,” and from thereby obstructing the alleged street. They own certain lots in severalty abutting upon the said strip of land, and base their right of suit upon the grounds that the threatened building upon, and obstructing the pretended street, will work an especial injury to them, differing from that suffered in consequence thereof by the general public. The appellants claim that the *locus in quo* is not a street, but private property belonging to the appellant R. S. Strahan, as assignee of the estate of the appellant Thomas Monteith. The main question in controversy is, whether the strip of land is such street or not; though the appellants’ counsel contended at the hearing that the suit could not be maintained until the legal title to the property was settled in a court of law; and that the respondents had failed to show by their allegations and proofs that any such wrong to their rights was threatened, as would authorize the interposition of a court of equity in their behalf. The latter question is by no means free from doubt, but I pass it over for the present in order to consider the general merits of the case. The parties to

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the suit filed a written stipulation in the case, in which, among other things, they stipulated, "that the land embraced in the tract alleged in the complaint as Hamilton Street is tide-land, and lies wholly below and north of the line of ordinary high tide in the Columbia River, and south of the north line of the donation land claim of John McClure, as described in the patent from the United States to John McClure." The patent to the claim, it appears, was not issued until 1866, but the settlement upon it and residence and cultivation were had long prior thereto; that after such settlement, residence, and cultivation, the said John McClure laid out a town partly upon his claim and partly upon the tide-land in front thereof, known as the town of Astoria, and constituting now a part of the city of Astoria; that he made a plat thereof, which was filed in the then office of the recorder of the county of Clatsop, on the sixth day of February, 1854, and duly recorded in said office, and was and is known as "John McClure's plat or map" of the town of Astoria; that among the streets indicated upon the said plat, and dedicated thereby to the public, was a street designated as "Hamilton Street"; that in 1858, the said John McClure sold the said donation claim to Cyrus Olney, and conveyed to him all his right, title, and interest in the same, with the appurtenances thereunto belonging, by deed of conveyance duly executed and containing covenants of further assurance; that on the twenty-first day of December, 1869, the said Cyrus Olney executed to the appellant Thomas Monteith a deed of conveyance to real property, described therein as situate, lying, and being in the town of Astoria, county of Clatsop, and State of Oregon, and known and designated on John McClure's recorded plat of said town as all of block 61, all of block 58, and all the land and wharfing privileges north of the east half of block 58; together with certain other lands, and all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, etc. Said Hamilton Street, as designated on the McClure plat, extends from low water in the Columbia River south, along the east side of blocks, numbered thereon, 58, 61, and 64; and between the same and a tier of blocks immediately east therefrom, numbered thereon, 57,

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62, and 63, each of said blocks except No. 57, which is indicated as fractional, is represented as containing eight lots, of fifty by one hundred feet each, fronting upon streets at right angles with Hamilton Street, and said Hamilton Street is fifty feet in width; that thereafter, and in 1867, the said Cyrus Olney prepared another plat of said town of Astoria, and extended the limits thereof south and west so as to include a large amount of additional territory in those directions; extended it east so as to include two tiers of lots, and a fifty-foot strip for a street; and on the north, so as to make said block 57 a full block, and add thereto a street and fractional block, the latter being numbered 56½; that he represented said blocks, 58, 61, and 64, as being seven lots in width from east to west, and two lots in length from north to south, which representation was so made by including said Hamilton Street as two of such lots, 5 and 10, in each of said blocks, and adding a tier of two lots adjoining the same on the east, and continuing a tier of blocks of the same width, and composing the same number of lots, south across his entire plat; that he also represented to the east of the fourteen lot blocks another tier of blocks of the regular size, extending from north to south, a street between the same of the regular width, and said fourteen lot blocks, and another street to the east of said tier of regular sized blocks added, extending from north to south, and upon which the latter blocks abutted. That the said Olney, on the first day of May, 1867, filed the said plat for record in the office of the clerk of said county of Clatsop, and the same was thereupon duly recorded therein, and designated as the plat or map of "McClure's Astoria as extended by Cyrus Olney." It is not shown that any lots adjacent to said Hamilton Street had been sold prior to the record of the Olney plat, except those sold to Monteith, and the appellants claim that he acquiesced in the change Olney made in the original plat.

The respondents, however, insist that he strenuously objected to it in the outset, which I have no doubt is the fact. But however that may be, we find that on the fourteenth day of May, 1879, he conveyed to E. D. Heatley, J. W. Grace, and J. M. TeuBosch, trustees of the estate of M. J. Kinney, among other

property, certain of the lots in said blocks 58 and 61, as represented on the Olney plat, and described the same in the deed of conveyance as lying and being in the city of Astoria, "as laid out by John McClure and extended by Cyrus Olney." It is evident from this that he had acquiesced in the Olney plat at that time. It also appears that one of the principal respondents, the Pythian Land Association, obtained the title to the lot claimed by that company ostensibly from the said trustees of Kinney, by deed which bears date June 1, 1881, and which is a mere quit-claim and release in form, and describes the premises conveyed as lot numbered 4 in block numbered 61 in the city of Astoria, in the county of Clatsop, and in the State of Oregon, "said city lot the same as laid off by John McClure and extended by Cyrus Olney according to the plats on file in the office of the county clerk." The title of John Hobson, another of the principal respondents, is derived from Warren's heirs by deed dated September 4, 1877. Their title came from the State by deed dated April 25, 1877. Said deeds purport to convey lot 9 in block 58, "according to the plat or map made and recorded by John McClure and extended by Cyrus Olney." It also stipulated in the written stipulation made and filed as before mentioned, "that the respondent plaintiff, Theodore Broenser, is the owner of lot No. 4, block 64, and that his claim of title is from Cyrus Olney subsequent to the second day of May, 1867; and that the conveyances described said lot as being lot No. 4, of block No. 64, according to the town of Astoria, as laid out and recorded by John McClure, and extended by Cyrus Olney, and that the immediate grantors of said Broenser purchased said lot 4 of block 64 from the State of Oregon as tide-land, April 28, 1879, and said lot is described in the deed as above." These three lots—lot 4 in block 61, lot 9 in block 58, and lot 4 in block 64—are the only ones, as I understand, represented in this suit; and I am unable to ascertain how the present owners of them have any grounds to complain of the alleged street being used as private property. At the time various owners purchased the several lots referred to, the Olney plat was on record, and they severally took under a conveyance recognizing it. The respond-

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ents' counsel contend that the latter plat was no more than an extension of the McClure plat, and not a change of it. The name given to it was "the plat or map of John McClure's Astoria as extended by Cyrus Olney"; that might indicate that it made no change in the original plat, only an extension of it; but whether it did or not must be determined by the plat itself and not from the name. A name may import a kind or quality quite different from that which the thing it is applied to possesses. Cyrus Olney, at the time he made and filed his plat of the town, was master of the situation; no one not having any vested interest to be affected thereby had any right to object to his preparing and recording any kind of plat he might devise, or of his giving it any name he saw fit. And a person having an interest that might be affected in consequence had full liberty to waive his objection thereto. Neither McClure nor Olney had any such title to the part of the town site between high and low-water mark, as would enable them to grant an interest in it to any one. The public already had the *jus publicum* for passage and navigation, and the general title vested immediately in the State, as soon as that institution was formed and admitted into the Union. The donation claimant, nor his grantee, had any interest in the land below high-water mark in front of the claim to dispose of, except his riparian rights, though he might, if he undertook to dedicate it to the public for a street or other use, estop himself from diverting it from such use as against one who had in good faith acted upon the dedication. But the respondents' interest in the property did not attach until long after the Olney plat was recorded, and was acquired with a full knowledge of the fact. Their counsel claim, however, that Olney did not intend to discontinue said street, and introduced his oral statements, made about the time the plat was prepared, to show that such was not his intention. The plat was duly acknowledged by Olney, and deliberately made by him and placed upon record, and is the best evidence as to what his intention was. It would hardly do to admit parol evidence to change its effect. It is as high proof as a deed, and cannot be varied by such testimony in a collateral suit without violating well-established rules of evidence.

As to the evidence of what Monteith said at the time said plat was made about Olney having changed the plat, and that "there was a street all around his block when he bought it, and he didn't propose to have it changed," nothing can be claimed in aid of the respondents. It is immaterial what Monteith may have said at any time, unless it was intended to induce the respondents to make purchase of their lots in question, and upon the faith of what he said for that purpose they did make such purchase. If he had said enough to estop him from claiming the lots designated in the said strip of land represented on the McClure plat as a street, the respondents might be able to take advantage of it, but that is not pretended. It does not appear how long Monteith's dissatisfaction continued. He subsequently, in 1875, made application to the State board for the sale of school and university lands, to purchase under the swamp and tide-land law the lots numbered 5 and 10 in block 61 and 58, and lot 10 in block 56½, as shown in Olney's plat, and which constituted a part of said Hamilton Street, as shown on McClure's plat; and thereafter, and on the 11th of June, 1877, said board executed to him in the name of the State a deed to the same. The respondents' counsel further claim that the legislative assembly of the State, by the act incorporating the city of Astoria, passed in 1876, granting to said city the fee to all recorded streets therein below high-water mark for the use of the public, granted the fee of Hamilton Street as represented on the McClure plat, as that was at the time, as they claim, a recorded street therein, coming within the description embraced in the grant. The language of the act relating to that subject as set out in the respondents' brief is as follows: "The fee of all streets now within the city, recorded, between high and low water of the Columbia River, is granted to the city, and all streets within the city limits and at right angles to the Columbia River are extended to the ship's channel for the use of the public, and the fee of the same is hereby vested in the city of Astoria, . . . and shall forever remain open as thoroughfares for the use of the public."

Two questions are presented by this act. The first one is its construction. Unless the legislature intended by it to grant to

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the city of Astoria the land within the boundaries of every street therein as shown upon every recorded plat of the town that had ever been made, it did not necessarily assure to the city the fee of said Hamilton Street as indicated on the McClure plat. The second one is, whether the grant, however extensive or limited in its construction, vests the fee of any street in the city of Astoria until its terms, relating to such streets, are accepted by the city? Ordinarily a grant has no effect until accepted by the grantee. The counsel for the respondents maintain, however, that the one in question is distinguishable from an ordinary dedication of streets in a town; that the act of the legislature by its own force made what is known as Hamilton Street a public street, to remain forever open "as a thoroughfare for the use of the public." I am inclined to think said counsel's view is correct as to streets coming within the purview of the act; but I doubt very much whether said Hamilton Street, so called, was included within such grant. The language of the granting clause, "all streets now within the city, recorded, between high and low water of the Columbia river," does not necessarily include it. It is true that the McClure plat represented it as such street, and that said plat was recorded, but Olney's plat superseded it as effectually as an amended pleading supersedes the original. At the date of the act, the latter plat had been recorded nineteen years, and the legislature evidently intended by the act to grant the fee of streets then recognized as public streets within the town. Olney's plat added a large number of streets and blocks to the town. It was systematically devised, and made some changes in the former plat; but they were evidently made to carry out a general plan. Blocks 58, 61, and 64, instead of being left four lots wide were made seven lots in width, and a tier of blocks was laid out across the entire plat in harmony therewith. Said plat was evidently recognized by the inhabitants of the town. Every deed under which the respondents claim title, coming from individuals or the State, refers to it as descriptive of the property conveyed. To re-establish said Hamilton Street would create a second tier of blocks two lots in width, from off the east side of said blocks 56½, 58, 61, and 64,

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and destroy the harmony of those blocks with the tier extending south therefrom. The legislature had no intention, in my opinion, to so disarrange the affairs of the town, and never meant to grant the land designated in said blocks 56½, 58, 61, and 64, as lots 5 and 10, in each block, to the city of Astoria, as a street, "to be forever open as a public thoroughfare," or to provide in regard to any of the streets except such as were recognized at the date of the act as public streets in said city. It would not be a general thoroughfare if opened; would only extend across four blocks and merely afford a local benefit. I am of the opinion, therefore, that the equities are with the appellants. This view renders it unnecessary to consider the other point referred to in the out-set of this opinion. The decree appealed from will be reversed and the case remanded to the Circuit Court, with directions to dismiss the complaint.

STRAHAN, J., was a party to the record in this cause, and took no part in its decision.

[Filed June 13, 1887.]

G. ELLIOTT, APPELLANT, v. W. STEWART ET AL.
RESPONDENTS.

TIDE-LANDS, WHAT ARE.—An isolated sand bank alternately covered and exposed by tides, situated one mile from the Oregon shore in the Columbia River, and entirely disconnected from the main lands, is not tide-land within the meaning of that term.

SAME.—The term "tide-lands" apply to those lands adjoining main land, and periodically covered and uncovered by the rising and falling tides.

APPEAL from Clatsop County.

Strong & Strong, for Appellant.

Fulton Brothers, for Respondents.

LORD, C. J.—This is a suit in equity to enjoin the defendants from fishing on certain premises described in the complaint, and alleged to belong to the plaintiff. The defendants denied

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the plaintiff's ownership, and alleged that the said premises are a shifting sand-bar in the Columbia River, and only exposed at low tide, being entirely covered with water at high tide, and that said sands or sand-bar have been immemorially resorted to by the public for fishing and drawing seines therein, etc. Issue being joined as to this, a trial was had, and a decree was rendered dismissing the plaintiff's complaint. Substantially, the evidence shows that the alleged land is a shifting sand-bar situated in the Columbia River some six miles from the Oregon shore, and about one mile from the Washington Territory shore, and that fishermen have resorted to these sands for many years to fish for salmon. The plaintiff derived his title by deed from the State, purporting to convey to him the premises as tide-land. The inquiry is, whether the State has been authorized by any legislation to dispose of lands of the character in question.

The first act providing for the sale of tide-lands was passed in 1872. It is entitled "An act to provide for the sale of tide and overflowed lands *on the sea-shore and coast*." Among other things, it provides that "the owner or owners of any land abutting or fronting upon or bounded by the shore of any bay, harbor, or inlet on the sea-coast, shall have the right to purchase from the State," etc. (Laws 1872, p. 129.) This act only authorizes the sale of tide-lands on the sea-shore and coast, bays, harbors, and inlets. It authorizes the owners abutting upon or bounded by the *shore* of any bay or harbor or inlet to purchase, and indicates quite plainly that the lands referred to as tide-lands are what is generally known as the shore or beach. The Act of 1874 was amendatory, and extended the right to purchase tide-lands on the shores of rivers and ocean beach, but the distinction here noted is preserved. The Act of 1878, which seems to be the final legislation upon the subject, provides only for the sale of that which is on the sea-coast, or in front of lands abutting on the ocean, or any bay, harbor, inlet, lake, or water-course. (Laws 1874, p. 76; Laws 1878, p. 42.)

In none of these acts is there any provision for the sale of lands coming within the description of the sands or sand-bar in question. Properly speaking, it cannot be said to be an island;

nor is there any abutting of land to it; but it is uncovered or exposed to the flux and reflux of the tides, though it does not register the high and low-water mark, being submerged six to seven feet at high tide, and laid bare at low tide. In *Andrus v. Knott*, 12 Or. 501, it was held that the term "tide-lands" applies to lands covered and uncovered by the tides, which the State owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high and low-water mark. In *People v. Davidson*, 30 Cal. 386, Shafter, J., said: "We find nothing in the Act of May 14, 1861, affording the slightest clue to the sense in which the legislature used the words 'tide-lands' therein. . . . Under such circumstances that definition must be adopted which on the whole is most reasonable; and that is supplied in our judgment by the words 'strand,' 'beach,' or 'shore,' in the common-law sense of the terms. Shore is defined to be land on the margin of the sea or a lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low-water mark. It is synonymous with beach, which is the strip of land between high and low-water mark. 'By a beach,' said Weston, J., 'is to be understood the shore or strand. . . . The word 'beach' must be deemed to be land washed by the sea and its waves, and to be synonymous with shore.'" (*Cutts v. Hussey*, 15 Me. 241.) In *East Haven v. Hemingway*, 7 Conn. 186, Hosmer, J., said: "The shore is that space of ground which is between ordinary high and low-water mark." And Butler, J., said that "the legal meaning of the term was indisputable." (*Church v. Meeker*, 34 Conn. 424; *Storer v. Freeman*, 6 Mass. 439.) "Lands belonging to the State by reason of its sovereignty includes the shores of the sea, and its bays and inlets, in the common-law definition of the word 'shore'; that is, the land usually overflowed by neap or ordinary tides." (Shafter, J., in *People v. Morrill*, 26 Cal. 353. See, also, *Doane v. Willcutt*, 5 Gray, 335.)

Taken in consideration with the language of the acts, and the common-law definition of the words used, and as have been

Points decided.

applied to the statutes of similar purport, it must be apparent that those acts of legislation referred to did not contemplate or authorize the sale of lands of the description in question. It follows that there was no error, and that the decree must be affirmed, except as stipulated as to damages; and it is so ordered.

[Filed June 14, 1887.]

STATE OF OREGON, RESPONDENT, v. DAN MORAN,
APPELLANT

EVIDENCE—CRIMINAL LAW—MOTION TO STRIKE OUT EVIDENCE.—The physician who made the *post mortem* examination and testified at the inquest, as well as the coroner, were called as witnesses, for the purpose of proving the death of deceased, and in their evidence they each called the deceased by his true name, though they had no knowledge of his true name other than having heard him referred to by that name. *Held*, the court did not err in refusing to strike out such evidence.

SECTION 169 OF THE CRIMINAL CODE—STATE v. WINTZINGERODE, 9 OR. 153, APPROVED.—Section 169 of the Criminal Code is only declaratory of the rule of the common law.

CONFESSION AS EVIDENCE—DUTY OF THE COURT WHEN OFFERED.—Whenever a confession is offered in evidence against the accused, the court must ascertain and determine as a question of fact, whether or not it was obtained by the influence of hope or fear applied by a third person to the prisoner's mind. This inquiry is preliminary and is addressed entirely to the judge.

EVIDENCE—CONFESSIONS OF PRISONER MADE UNDER AGREEMENT WITH THE DISTRICT ATTORNEY.—The appellant agreed with the district attorney that he would testify fully and freely in the case then pending against one Kelley on a charge for the same killing, and did so testify before the coroner's jury and the grand jury, but during Kelley's trial, the appellant escaped and Kelley was acquitted. *Held*, that when the defendant was put on his trial for the same killing, his confessions and former testimony might be given in evidence against him. (*Commonw. v. Knapp*, 10 Pick. 477, approved and followed.)

EVIDENCE GIVEN BEFORE THE GRAND JURY.—If in the opinion of the trial court the ends of public justice require it, such court may allow a member of the grand jury to testify as to what any witness testified to before that body, if such evidence is otherwise competent.

CRIMINAL LAW—INDICTMENT—EVIDENCE.—Under section 748, Code of Criminal Procedure, where it is charged that the prisoner killed deceased by administering poison, *held*, that it is competent to prove that the poison was in fact administered by the hand of another, provided it be shown that the defendant procured the act to be done, or aided, abetted, or in any manner assisted in the commission of the crime.

EVIDENCE—READING A MEMORANDUM OF FACTS BY WITNESS BEFORE GOING ON THE WITNESS STAND.—Evidence given by a witness is not incompetent, for the reason that before going on the witness stand he refreshed his memory by reading

15 202
17 636
14* 419
21* 882

15 202
99 91
15 203
133 540

15 202
85 891
135 538

15 202
488 49

15 202
39 172
15 262
45 607

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a narrative of the facts written by another. Such an objection goes to the weight of the evidence, the credit which it ought to receive, and not to its competency. Here the witness had some knowledge of the facts—how much does not appear—before looking at the memorandum.

EVIDENCE—DEFENDANT'S ADMISSION.—An admission made by the defendant that a short time after the administration of the poison—morphine—which destroyed the life of deceased, he took money from the pocket of said deceased to keep for him, was properly received, on the ground that the entire statement is to be taken together, and it is not objectionable even if it tended to prove another offense.

CRIMINAL LAW—PRACTICE—VIEW BY THE JURY.—Where the jury by agreement of counsel and the direction of the court visited the scene of the murder, and also the county jail, without the presence of the prisoner, *held*, that these facts furnished no sufficient reason why sentence should not be pronounced on the verdict. (*State v. Ah Lee*, 8 Or. 214, approved and followed.)

APPEAL from Multnomah County.

Henry E. McGinn, and *Nathan D. Simon*, for Respondent.

Chamberlain & Morrow, for Appellant.

STRAHAN, J.—On the eighteenth day of November, 1886, the appellant was indicted for the crime of murder in the first degree by the grand jury of Multnomah County. The charging part of the indictment is as follows: "The said Dan Moran, on the seventh day of July, A. D. 1886, in the county of Multnomah and State of Oregon, purposely and of deliberate and premeditated malice killed Frederick Kaluscha, by then and there administering to him, the said Frederick Kaluscha, poison, namely morphine, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Oregon." Thereafter a trial of said cause was had before a jury, which resulted in a verdict of guilty as charged in the indictment. Afterwards, on motion of the defendant, the court set aside the verdict and granted him a new trial. On the second trial, the jury found the defendant guilty of manslaughter, upon which verdict the court sentenced him to imprisonment in the penitentiary of the State of Oregon for fifteen years, from which judgment he has appealed to this court.

Upon the trial here, counsel for the appellant, as well as the State, have displayed great research and ability, and the various questions presented were exhaustively argued, and it now only

remains for the court to state the conclusion reached, and to indicate the reasons therefor.

1. On the trial in the court below counsel for appellant moved to strike out the evidence of Coroner De Linn and Dr. Bevan. The evidence which was included in this motion was in substance this: Coroner De Linn testified that he took the body of deceased to the morgue, where an inquest was held; found his name was Frederick Kaluscha, and that he was a carpenter on board the ship *Candidate*. On his cross-examination he testified that he knew the name of the deceased by hearing witnesses testify to it, and that he had no personal acquaintance with the deceased. Dr. Bevan's evidence was to the same effect. The evidence in neither case was objected to when offered; but in addition to this objection to counsel's position, there was no particular controversy upon the trial as to the identity of the deceased. O'Brien and other witnesses testified to his identity very fully. The object in calling the coroner and Dr. Bevan was to prove the fact of death, and not the identity of the deceased. The court did not err in refusing to strike out this evidence.

2. On the trial in the court below the State introduced the declarations of Moran given under oath, before the magistrate, in the case of the *State v. James Kelley*, who was charged with the crime of murder in the killing of Kaluscha; also the declarations of Moran given under oath before the grand jury of Multnomah County in the same case. Counsel for the defense claim that the declarations and admissions under oath before the committing magistrate ought not to have been admitted, for the reason they were given and made upon an understanding with the district attorney and the police officers, that if he would testify fully as to all he knew in relation to the poisoning of Kaluscha, that he, Moran, should not be prosecuted for any complicity therein. They also object to the statements made by Moran before the grand jury in the same matter, for the same reasons, and upon the further ground that it was incompetent for the trial court to allow the proceedings before the grand jury to be made public for this purpose.

3. It must be taken as settled in this State that section 169 of the Criminal Code is only declaratory of the common-law rule in relation to confessions. (*State v. Wintzingerode*, 9 Or. 153.) Upon the trial of a criminal case, therefore, whenever a confession is offered in evidence against the accused, it becomes necessary for the court to ascertain and determine whether or not the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind. This inquiry is preliminary, and is addressed to the judge who admits the proof—the confession—to the jury, or rejects it, as he may or may not find it to have been drawn from the prisoner by the application of those motives. (1 Greenleaf on Evidence, §§ 219, 220; *People v. Soto*, 49 Cal. 67; *Rud v. Clark*, 47 Cal. 195; *State v. Squires*, 48 Cal. 364; *Redd v. State*, 69 Ala. 255.) In *Redd v. State*, *supra*, it is said: "It is a well-established maxim of the law that the *admissibility* of evidence is always a question to be determined by the court, and its *weight* or credibility is for the determination of the jury. It is for the court, therefore, to say whether the confessions of a prisoner are *voluntary* or *involuntary*, and this question being judicially settled, cannot be reviewed by the jury. Hence a charge is erroneous which submits to them the decision of this legal question, and should for that reason be refused." So in *State v. Squires*, *supra*, the same principle is thus stated: "Whether the confession of the prisoner was voluntary or not, is purely a question of fact; as much so as the question whether a witness, offering to testify, was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown so as to allow the introduction of secondary evidence of its contents. In this and like cases, the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies so far as the question is one of fact." When this evidence was offered in the court below it was objected to by counsel for the appellant, because the statements and declarations of the defendant which were offered in evidence, and which he had

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sworn were true on the previous occasions referred to, had not been freely and voluntarily made, so as to entitle them to be admitted. Evidence was heard by the court for and against this objection, and the court then decided to admit the evidence offered. In other words, the court decided that these sworn statements of the prisoner were freely and voluntarily made, within the true meaning of that rule of law, and admitted them. The bill of exceptions does not purport to set out all the evidence submitted to the court on that issue. In such case it is not perceived how this court can review the decision of the trial court on that question. (*State v. Tom*, 8 Or. 177.) But we are not disposed to rest the decision of this cause on that question alone.

4. Assuming now that all of the matters objected to are confessions, or in the nature of confessions, it is believed that they fall within what might be regarded as an exception to that rule, or if not an exception, a modification thereof in its application to the particular facts disclosed by this record. In order that there may be no misunderstanding as to the precise facts in this case so far as they are disclosed by the record, a brief reference to the testimony is proper. Pending the decision of the court below as to the admissibility of this evidence, the district attorney was sworn and testified in substance: "It is not true, as testified to by the defendant Moran, that I, at any time, either directly or indirectly, agreed to give him anything for testifying in the case against James Kelley. There never was at any time, in my presence, any offer made to the defendant Dan Moran, but this one: That if he should become a witness in the case against James Kelley, he should not be prosecuted for any connection he had with that crime. The statement that I said that I would give him a ticket to go East is entirely false. I never made him any offer except that he should not be prosecuted for any connection which he had with the killing of Frederick Kaluscha, and had he kept his word I certainly would not be here prosecuting him." Policeman Berry, whom it is claimed held out some inducements to Moran to testify against Kelley and make a full disclosure, testified on the same occasion before the court below: "I never

promised him (Moran) any money, or made any threats against him to do him bodily harm, or made him any offer except that he should have his liberty if he testified against Kelley. I was present in the chief of police's room when the offer was made to Moran to be a witness for the State, and he accepted that offer. There was no inducement to my knowledge held out to Dan Moran at the chief of police's office in this city, when he made the statement I stated he made a little while ago on the stand; and I heard every word that was uttered in the room during this interview when the matter was under discussion. No promise of any kind was made except that of his personal liberty; and that was made at his own solicitation and request." R. M. Dement, police judge of the city of Portland, on the same occasion and to the same point, testified in substance as follows: "I am police judge; I was such in the month of July last; I know Dan Moran; I didn't know James Kelley until the time of his incarceration; I don't know that I know all the circumstances under which Dan Moran became a witness against James Kelley down in the Police Court; I know a great many circumstances connected with it; perhaps, as many as anybody other than yourself. The time at which he made the agreement to become a witness against James Kelley was in the presence of yourself (the district attorney), and if my recollection serves me right, the chief of police, Mr. Berry, one other gentleman, and myself were in the office of the chief of police in the city jail; this thing had been brewing, if I may so call it, for quite a time; an effort had been made to secure the statement of Moran or O'Brien or somebody knowing the facts with the view of securing the conviction of some one connected with this crime; it was to that end that the district attorney, the chief of police, and this other gentleman, including myself, had been working. At the time I refer to, Moran had been talking for some time with various persons, myself among others, and he was leading us to believe that he would tell the truth; but there seemed to be one point that he raised . . . ; he wanted the assurance of some person upon whom he could rely, that he would be held harmless in the matter; that assurance was given to him in my presence by

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the chief of police, and I remember that I joined with him in the statement that for the ends of justice, the district attorney would probably agree to it. And I think it was at his request that Mr. McGinn was present at the time I refer to, at Moran's request; there was a positive agreement made at that time, as positive as an agreement could be made . . . he, Moran, wouldn't be prosecuted provided he would tell the whole truth in the matter." And as to what transpired before the grand jury on the same subject, Mr. Severson testified substantially as follows: "Well, he demanded of the grand jury that they give him their word of honor that they wouldn't prosecute him in case he turned State's evidence; that they would stand by him and not prosecute him. Mr. Ladd assured him that we would do it; that we would see that he wasn't prosecuted in that case if he would turn State's evidence, and tell the whole truth and nothing but the truth. He still hesitated and didn't seem satisfied; and we finally all of us individually consented, and assured him that we wouldn't prefer any charges against him if he would tell the whole truth and nothing but the truth before us and before the trial jury when the trial came off, and he finally consented to that and took the oath. He accepted the proposition that we made to him and was willing to stand by it, apparently. And after he took his oath one of the grand jurors said to him: 'Now, Dan, you know what you are doing; you understand this'—wanted to call it up to him again—and then he went on with his story." The sequel to all this is found in the testimony of Jailer Dougherty as follows: "My name is E. J. Dougherty; in the month of November, 1886, I was employed by Thomas A. Jordan as jailer of the county jail; Dan Moran was in custody as a witness against James Kelley before the grand jury had acted on the case of Kelley; he was kept in close confinement and was allowed no liberties whatever; but after he had agreed to become State's evidence, he was allowed more liberty. On the morning of Saturday, November 6, 1886, knowing that he was to be called to court to testify as a witness, he asked for permission to blacken his boots; he was taken into the witness room, the door being unlocked. The sheriff then sent me in search of

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one Casey, another witness, and when I returned he had *left and gone*; he ran away, and I knew he could not be found, although every effort was made to find him." It elsewhere appears in the record that Kelley was then on trial, and that Moran did not appear to testify against him, and that he was acquitted.

In *Commonw. v. Knapp*, 10 Pick. 477, the attorney-general wrote the prisoner a letter promising the protection of the government on condition of his making a full disclosure and testifying in the case fully and truly. "The benefit was offered upon the sole condition that he should make an explicit, exact, and full disclosure of every circumstance connected with the event referred to; and he was informed that in case of refusal to answer, touching any topic known to him, or of any evasion, equivocation, or designed contradiction, or withholding of testimony, he was not to receive the benefit. To that he assented." A full confession was made by the prisoner under this arrangement with the attorney-general; but upon being called to testify against his accomplices, he refused to do so. The prisoner was then placed on trial, charged with the same crime, and his confessions previously made under the agreement with the attorney-general were offered in evidence against him. In disposing of his objection made to the admission of this evidence, the court said:—

"The confessions which are now offered in evidence were made deliberately, in part execution of the prisoner's agreement. But upon being called to testify upon the trial of John Francis Knapp, he refused to do so. By his refusal to testify it is admitted that he has forfeited all claim to the extraordinary favor of the government. But in what did that favor consist? It was in not using that confession against himself if he would conduct himself faithfully as a State's witness. By his refusal the government are absolved, and it is now contended that the prisoner is absolved also, and that his confession cannot be used against him, notwithstanding his refusal. Persons who are properly admitted here as State's witnesses are substantially in the same situation as persons in England who are properly admitted to become witnesses for the Crown against their accomplices. The protection of the government is extended on the same terms, although

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the forms of proceeding are somewhat different. There, if the witness for the Crown conducts himself fairly, and makes and testifies to a full disclosure, he is recommended to mercy, and a full pardon is always granted. Here the attorney-general, of his own authority, and upon his official responsibility, gives the pledge of the government that the State's witness shall not be prosecuted if he makes and testifies to a full disclosure of all matters in his knowledge against his accomplices. In England as well as in Massachusetts, those who are admitted as witnesses for the government may rest assured of their lives if they perform their engagements; so that it becomes a material inquiry how those persons in England who have been admitted as witnesses for the Crown are dealt with if they fail to redeem the pledge which they made to the government upon receiving the benefit of becoming king's witnesses. And we believe the law to be clearly settled there that if they refuse to testify, or testify falsely, they are to be tried themselves, and may be convicted on their own confession, which was made after they were permitted to become witnesses for the Crown."

This case was decided in 1830, and so far as our research extends has never been overruled or questioned. The rule of the common law is thus stated in Roscoe's Criminal Evidence (pp. 125, 126): "So where in a case of burglary an accomplice, who had been allowed to go before the grand jury as a witness for the Crown, upon the trial pretended to be ignorant of the facts upon which he had before given evidence, Coolidge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded." (*Rex v. Moore*, 2 Lew. C. C. 37.) "So where an accomplice, after making a full disclosure before the committing magistrate, refused before the grand jury to give any evidence at all, Wrightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession." (*Rex v. Holtham* [Staff. Sp. Ass. 1843], 2 Russ. by Greav. 958.) "So where an accomplice who was called as a witness against several prisoners gave evidence which showed that all, except one who was apparently the leader of the gang, were present at a robbery, but refused to give

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any evidence as to that one being present, and the jury found all the prisoners guilty, Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes and then tried." (*Rex v. Hokes* [Staff. Sp. Ass. 1837], 2 Russ. by Greav. 958.) To the same effect are the standard authorities in this country on this subject. (1 Greenleaf on Evidence, § 379; *Whiskey Cases*, 99 U. S. 594; Wharton's Criminal Evidence, § 656; *State v. Lyon*, 81 N. C. 600.)

Counsel for appellant seem to overlook the fact that this party is an admitted accomplice in the administering of the drug which caused the death of Frederick Kaluscha, and that he was promised immunity upon the sole condition of his testifying fully as to his knowledge of the crime in the case against Kelley. At the very last moment, when the jury in Kelley's case were in the box, and when he must have known that his refusal to testify would result in the acquittal of Kelley, he fled. By his own act and bad faith he voluntarily laid aside and deprived himself of the protection which had been accorded him. In such case it is difficult to see on what ground he can complain. The authorities cited clearly declare the rule of law applicable to such case, but we think they are supported by the better reason as well. It is the policy of the law that for every violation of its mandates proper punishment shall be inflicted. But this is not always practicable; many crimes are committed in secrecy, and those concerned in their commission find their best security in silence, but even this is not always safe, because circumstances frequently point out the guilty and the means used in the perpetration of the crime with unerring certainty. In other cases some one of the parties concerned in the commission of the crime, prompted, it may be, by a sense of guilt or the fear of discovery and punishment, makes known to the officers of the law his willingness to make a full and complete disclosure of all he knows on the subject, and to testify to the same upon the trial of his accomplices upon the sole condition that he shall not be prosecuted. This is called a *confession*. It is an admission of guilt, and the argument that would exclude this species of evidence

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because it may be false would exclude all evidence. Its falsity is possible, and so may be any evidence offered in a court of justice; but it is not rejected for that reason. It is received and tested and weighed by the rules of law, and then the case is determined according to the effect it has produced on the minds of the jury. It must, therefore, be assumed that when a party makes a *confession*, it is an acknowledgment of some degree of guilt on his part in connection with the particular crime. If such confession is made under the sanction of the court or the district attorney, and with the understanding that the party shall make a full and complete disclosure and testify to the same upon the trial of his accomplices, is the State not equitably bound by the terms of such an agreement? And the public faith being thus plighted, could its violation be tolerated for an instant? (*People v. Whipple*, 9 Cowen, 707.) And is it not equally true that if the State is bound the party making the confession is also bound to the like good faith on his part? He cannot be permitted to refuse to testify against his accomplice and then claim the full benefit of his agreement with the State, when his confessions are offered in evidence against him. Having wilfully refused to testify against his accomplice, has he not forfeited the immunity which the State offered him upon that sole condition? His only complaint is that the State used his confession against him upon the trial; but this he could have avoided by going on the witness stand and narrating what he knew of the commission of the crime. Having failed to do this, he has no cause of complaint, and especially so where the truth of his confession was not denied by him, but on the contrary, was corroborated by all the attendant circumstances.

In opposition to the numerous authorities cited by respondent, counsel for appellant have referred to *Womack v. State*, 16 Tex. 178. It must be conceded that this case tends to support the appellant's contention; but this case rests on the authority of that court alone. No decision of any court is cited to sustain it; nor is *Commonw. v. Knapp*, *supra*, nor any of the numerous common-law authorities, referred to; but the court apparently based its decision on the general proposition that to render

a confession admissible it must have been voluntarily made, without the appliances of hope or fear by any other person. In the examination of this question we have not been unmindful of the great care and caution courts must always exercise in the admission of confessions of persons accused of crime, nor of the fact that they must have been freely and voluntarily made; but these considerations do not appear to be sufficient to exclude accusatory facts, freely and voluntarily disclosed by an accomplice under an agreement made by the State, represented by its district attorney, that he will testify fully and truly against his associate in the crime, and who thereafter repudiates his agreement and refuses to testify. In such case the common-law rule undoubtedly is, that such admissions and confessions may be given in evidence against him. And that rule having never been changed or abrogated by any statute, and not being inconsistent with our Constitution or laws, nor inapplicable to our circumstances and condition, must be regarded as in force in this State. The evidence offered and received upon the trial was not, therefore, incompetent on any of the grounds thus far considered. But counsel further insist that Severson's evidence was improperly admitted, for the reason he was a grand juror when the disclosures testified to by him were made by the appellant, and that such statements were made before the grand jury. It therefore becomes necessary to determine whether or not it is competent for the trial court, in the exercise of a sound judicial discretion, to allow a grand juror to testify as to matters which transpired before that body, when, in the opinion of the court, the ends of justice require it.

5. *Grand juror allowed to testify.* The policy of the law generally is that the proceedings before the grand jury are secret. The reasons for this secrecy are many and obvious. It assists them in discharging their important duties; they are not troubled with any questions by the interested or curious; the means and sources of their information are not made public until the trial of the accused, and in many cases the guilty may not know that he is even suspected of crime until he is in custody. But there are cases in which the court is authorized to

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remove this secrecy, and to require the proceedings before the grand jury to be disclosed.

It is provided by section 58 of the Code of Criminal Procedure that a member of a grand jury may be required by any court to disclose the testimony of a witness examined before such grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before such grand jury by any person upon a charge against such person for perjury, or upon his trial therefor. And Mr. Bishop, in his work on Criminal Procedure, volume 1, section 859, states the rule thus: "But when the reasons for keeping the testimony private have passed away, the obligation of secrecy would seem to have ended also. Yet when, in addition to this, the claims of public justice must go unsatisfied unless the disclosure is made, the same reason which originally required secrecy, require that the secret be no longer kept." So in *Burnham v. Hatfield*, 5 Blackf., it is said: "Upon the trial, the defendant offered to prove by a member of a previous grand jury some admissions respecting the cause of action made by the plaintiff on his examination before the grand jury. This evidence was objected to, and the objection sustained. We think the witness ought to have been examined. The oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of the grand jurors in a court of justice what passed before the grand jury." To the same effect is *Sands v. Robinson*, 12 Smedes & M. 704. It is there said: ". . . it seems not to be contrary to the policy of the law to allow disclosures by the grand jury of what has been testified before them when they are called upon as witnesses in court to speak in relation thereto; but to permit it or not is, in the discretion of the court, according to the time or circumstances of each case." And to the like effect is *State v. Broughton*, 7 Ired. 96; 45 Am. Dec. 507; *State v. Wood*, 53 N. H. 484; *People v. Young*, 31 Cal. 563; *Burdick v. Hunt*, 53 Ind. 381; and Wharton's Criminal Evidence, § 110, and n. 5, where the authorities are very fully collated. It may be conceded that the authorities cited from

Missouri and Minnesota are opposed to this view; but it seems clear to us that they are at variance with the great weight of authority on this subject, and in addition to that, they rest upon a narrow and technical construction of the statutes of those States. The court, therefore, did not err in allowing the grand juror Severson to disclose Moran's testimony before that body.

6. *Construing section 748 of the Criminal Code.* Counsel for the appellant insist, also, that the court erred in allowing evidence on the part of the State tending to prove the administering the poison to the deceased by Kelley, and the defendant's complicity therein, for the reason that the necessary facts are not stated in the indictment. The indictment against the appellant is in the usual form in use in this State, and charges him with the crime of murder in the first degree. The Criminal Code, section 748, provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such." Under this section, any person concerned in the commission of a crime is a principal, and is to be charged as such whether he directly committed the act or not, and all evidence tending to prove his complicity in the crime is admissible under that form of indictment.

7. *Testimony from memoranda.* It appears from the testimony of Severson that before going on the stand as a witness he had read over some memoranda taken before the grand jury by some person other than himself, of the statements of the prisoner before that body, and in that manner refreshed his memory; but he did not refer to or use the same while he was on the witness stand. This witness, before testifying, said he remembered the substance of Moran's statements; and it was that which he repeated to the jury. Appellant's counsel objected to Severson's evidence, because he had referred to the memoranda before coming on the stand as a witness. This objection does not go to the competency of the evidence offered, but to its credibility, a matter which was exclusively for the jury. On his cross-examination

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the appellant had the right to test the strength and accuracy of the witness' memory, and of course if the only knowledge he then had of the facts was what he derived from the memoranda, then his testimony would have been weakened to that extent; in fact, would have been shown to be of but little value. On the contrary, if his memory was accurate and retentive, and the facts were present in the mind of the witness, independently of the memoranda, a cross-examination would have rather tended to strengthen than weaken his evidence, and the fact that the witness had looked at this paper, when it appeared that he did not write it himself, or that it was not written under his direction, when he knew the facts recited in it, went also to the credibility of the testimony. It tended to weaken his evidence in some degree, and the jury must have considered this matter in passing on the guilt or innocence of the accused.

8. It appeared in evidence that about two hours and a half after the deceased had been poisoned in Kelley's saloon, and while he was lying on a lounge asleep, in Turk's boarding-house, the appellant took two dollars from the pocket of the deceased, for the purpose of keeping the same safely for him until he should awake. Exception was taken to this evidence, but it was clearly competent. In the first place, it was part of the appellant's statement as to his connection with the transaction. The State also had the right, and it was bound to submit to the jury, not a part, but the substance of his entire statement. It is not perceived that any error was committed in admitting this evidence.

9. *Inspection of place in absence of defendant.* It appears from the record that during the examination of the case the district attorney asked the court that the jury be allowed to view the premises. The defendant's counsel said he would like to have the court make an order that, in addition to viewing the premises, the jury may also view the dark cell and "sweat-box" at the city jail. The district attorney said he was satisfied this should be done. The court stated that the parties having consented, such will be the order; that the jury view the *locus in quo*, and the dark cell and room in the third story of the city

Points decided.

jail. When the prisoner was called for sentence, he objected, for the reason that the jury had been allowed to view the premises where the crime was alleged to have been committed without his presence; but the court overruled his objection and sentenced him, which action of the court is now assigned as error. This objection was presented to this court, and decided adversely to the appellant in *State v. Ah Lee*, 8 Or. 214, and we see no sufficient reason to reconsider or review what was then decided.

There were some other questions presented on the argument in behalf of the appellant, and which we have examined, and deem them not of sufficient importance to require separate notice.

[Filed June 14, 1887.]

HENRIETTA M. KELLEY, RESPONDENT, v. WILLIAM F. HIGHFIELD, APPELLANT.

BREACH OF PROMISE—EVIDENCE—RELATIONS OF PARTIES.—Upon the trial of an action for breach of promise, to enable the jury to understand the relations between the parties, their acts and feelings toward each other during the entire existence of the contract, as well as the causes and circumstances which attended the breaking of the engagement, evidence may be given of the declarations of the parties on those subjects.

BILL OF EXCEPTIONS—WHAT IT MUST SHOW.—A question to a witness, and the ruling of the court refusing to allow it to be answered, and the exception, present no question for review. The bill of exceptions ought to disclose the particular facts sought to be elicited by the question.

GENERAL REPUTATION—HOW PROVEN.—Witness must first be asked touching his knowledge of the party's general reputation, and he may be then asked whether it is good or bad, if found to possess sufficient knowledge on that subject.

PROFESSIONAL WITNESS—DISCLOSURE OF FACTS LEARNED PROFESSIONALLY.—A physician cannot without the consent of his patient be questioned concerning any facts learned by him in the course of his professional employment.

ARGUMENT OF COUNSEL BEFORE JURY—NOT TO COMMENT ON FACTS EXCLUDED BY COURT.—Upon the trial before the jury, it is improper for counsel to refer to or in any manner animadvert upon the plaintiff's refusal to consent that her physician be examined. It is a privilege which the law secures, and it is not to be questioned.

KNOWLEDGE OF LEWDNESS—ITS EFFECT UPON THE CONTRACT.—If a man knowingly enter into a contract of marriage with a lewd woman, he is bound to perform his contract or pay such damages as a jury may deem proper under all the circumstances.

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16* 176
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23* 264
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GOOD FAITH OF THE DEFENDANT—EFFECT OF PLEADING WANT OF CHASTITY AS A DEFENSE.—When the court in effect told the jury that if the defendant made the charges set up in his answer in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after the renewal of this contract with her, and he repudiated it by reason of this conduct of hers, of this belief that he had entertained, then you should not allow the circumstances to weigh as much in the assessment of damages as if he had made the charges recklessly, wantonly, and wilfully; but you will take the circumstances all into view, and inquire "How has he made the charge? Has it been a reckless, wanton, or malicious charge, or has it been done in good faith? You will determine the manner and *animus* of this defense, as well as the question of the amount of damages." *Held*, not error.

MEASURE OF DAMAGES IN ACTIONS FOR BREACH OF PROMISE.—In such case there is no fixed rule of damages, other than the sound discretion of the jury, under all the circumstances. They may allow punitive damages in their discretion.

INSTRUCTION MUST NOT WITHDRAW FACTS IN EVIDENCE FROM THE JURY.—A hypothetical instruction which fails to notice material facts in evidence, and which attempts to submit the case to the jury on the assumption that such facts were not in evidence, is erroneous, and the court did not err in refusing it. The effect of such an instruction is to withdraw material facts from the consideration of the jury.

DAMAGES—EFFECT OF ANSWER SETTING UP WANT OF CHASTITY.—The defendant by his answer alleged that the plaintiff was unchaste, but offered no evidence tending to prove such allegations, other than his own criminal conduct with the plaintiff. Under such circumstances, there is nothing upon which the claim of good faith can be predicated.

APPEAL from Multnomah County.

W. Carey Johnson, for Appellant.

John H. Mitchell, for Respondent.

STRAHAN, J.—This is an action to recover damages for breach of a promise to marry. The complaint alleges mutual promises of marriage between the parties on or about December 17, 1877, the marriage to take place within a reasonable time thereafter. It is also alleged in the complaint that by the mutual consent of the parties, the marriage ceremony was postponed from time to time during the subsequent years down to and until about the sixth day of April, 1885, at which time it was mutually agreed that such marriage ceremony, which by mutual consent of the parties had been postponed until that time, should be again postponed until on or about the last of the month of July, 1885, and that said marriage should then take place between said par-

ties in pursuance of the original engagement to marry made in December, 1877, the performance of which said marriage ceremony had been postponed as in complaint alleged. The complaint then alleges the breach on the part of the defendant, her demand that he perform his agreement at various times subsequent to the last day of July, 1885, and prayer for twenty thousand dollars damages.

The defendant's amended answer denies specifically each material allegation of the complaint. The answer then sets up a number of separate defenses, in substance as follows:—

“Defendant for a further and separate answer and defense, alleges that on or about the eighteenth day of September, 1885, the plaintiff voluntarily abandoned said alleged marriage contract, and voluntarily and wholly released the defendant from all obligation she claimed against him under said pretended contract before said date.

“And for a further and separate answer and defense, the defendant alleges that *after* the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a woman of bad reputation for chastity; and so conducted herself in her intercourse with men, as to establish for herself the reputation of a common or lewd woman, and was so reputed to be for more than five years before the commencement of this action.

“And for a further and separate answer and defense, the defendant alleges that *after* the date of the pretended contract alleged in the complaint, the plaintiff became and was a common prostitute, and continued to deport herself as such for more than five years before the commencement of this action, at and about buildings, occupied, used, and controlled by her, about the corner of B and First streets, in the city of Portland, Multnomah County, Oregon.

“And for a further and separate answer and defense, the defendant alleges that after the date of the pretended contract alleged in the complaint, the plaintiff committed the crime of adultery, and did have carnal sexual intercourse on or about the twenty-fifth day of April, 1885, at her residence near the corner of B and First streets, in the city of Portland, Multnomah

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County, Oregon, with a man whose name is to this defendant unknown, and as to whose identity he is unable to make any more particular statements.

"And the defendant for a further and separate answer and defense, alleges that on or about the twenty-fifth day of December, 1884, at her place of residence near the corner of B and First streets, in the city of Portland, Multnomah County, Oregon, the plaintiff committed the crime of adultery, and did then and there have carnal sexual intercourse with a man whose name is to this defendant unknown, and as to whose identity he is unable to make any more particular statements.

"And the defendant for a further and separate answer and defense, alleges that *after* the dates of the pretended contract set out in the complaint, the plaintiff, at her place of dwelling near the corner of B and First streets, in the city of Portland, Oregon, did for more than five years next preceding the commencement of this action carry on the business of selling the use of her person in sexual intercourse with men for hire, and at divers and sundry times, and from time to time during said five years did commit the crime of adultery in carrying on such business, and did have carnal sexual intercourse with divers and sundry and numerous men whose names are to this defendant unknown, which unlawful conduct of plaintiff came to the defendant's knowledge since December 17, 1877."

A reply was filed, putting the new matter in the answer in issue. Upon this state of pleadings, a trial was had before a jury in Multnomah County, which resulted in a verdict for the plaintiff for fourteen thousand dollars. The defendant's counsel moved to set the verdict aside and for a new trial, and upon this motion the court put the plaintiff to her election, to either consent to take a judgment for seven thousand dollars and remit the excess, otherwise a new trial was to be granted. The plaintiff elected to take judgment for seven thousand dollars, which was duly entered, from which judgment this appeal is taken.

Numerous errors are assigned in the notice of appeal, to which a more particular reference will now be made in their order.

The plaintiff called one A. P. Butler as a witness, who testified in substance, that on or about the first day of June, 1885, he had a barber shop in the plaintiff's premises and near her dwelling; the defendant came to where the witness was standing near such barber shop. Plaintiff asked said witness this question:—

“State what he (Highfield) said, if anything, in reference to Mrs. Kelley, the plaintiff in this case, or about her.” To which question an objection was made, but the court overruled the objection, and an exception was taken, and the witness answered: “Highfield came up to me and I was turned; had my back to him; he hit me on the shoulder, and said: ‘How do you do?’ shook hands with me; talked with me for awhile about Mrs. Kelley.

“Question. State just what he said.

“Answer. Wanted to know if Mrs. Kelley was at home; I told him I didn't think she was; I saw Mrs. Kelley going up the street; he says, ‘I think Johnny Pillsbury is down from Oregon City, and I think she has gone out to give Pillsbury a chance.’ Mr. Highfield took some cigars out of his pocket, and gave me a cigar, and kept looking up stairs all the time from the shop, and he says: ‘I hear there is a nice-looking girl over my place in the hotel.’ He said he had heard there was a nice-looking girl there, and he would like to go up and see her, but he was afraid Mrs. Kelley would see him; so I told him he need not be afraid, he could go up if he wanted to. He said: ‘I am afraid to go up there, but,’ he says, ‘I will go if you will go with me,’ and I said, ‘all right, I will go along with you.’ I went up stairs ahead of him, and he followed me up; when I got to the head of the stairs I rapped on the door, and she came to the door, and I says, ‘this is Mr. Brown.’

“Q. Do you know the girl's name?

“A. They call her Little Casino.

“Q. Was that her name?

“A. I don't know her name; I had seen her several times; but I don't know her name; I rapped at the door and she came to the door; I says, ‘this is Mr. Brown.’”

The introduction of all this evidence was excepted to, and is now claimed that its reception was erroneous.

This evidence was properly received. It was important for the jury to understand the relations between these parties; their acts and feelings toward each other during the entire existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement. (*Simmons v. Simmons*, 8 Mich. 318.) Besides this, the declarations and admissions of the defendant which necessarily tended in any way to wound plaintiff's feelings were certainly proper for the consideration of the jury. Says a late author on this subject: ". . . The jury may take into consideration all the facts and circumstances of the case, and the conduct of both parties towards each other, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action." (3 Sutherland on Damages, 321; *Reed v. Clark*, 47 Cal. 199; *Grant v. Willey*, 101 Mass. 357; *Johnson v. Jenkins*, 24 N. Y. 252.)

The exception taken to the refusal of the court to allow the witness Fred Meyer to answer the question propounded to him is not available. The witness did not answer, and it nowhere appears from the bill of exceptions what fact appellant expected to elicit by the question. To make this exception available the bill of exceptions ought to have gone further and shown what it was expected to prove by the answer to this question. And the same remark is applicable to the question propounded to the witness Dr. H. W. Ross, which was excluded. Defendant's counsel asked the witness W. H. Watkins, who was the defendant's witness, this question: "You have been asked about the character of the plaintiff before the commencement of this action; now you may state since, whether you have heard it more frequently discussed." This question was also objected to, and the witness was not allowed to answer it, to which an exception was taken; but this exception presents no questions we can review, for the reasons already stated. But this question ought not to have been answered, for the reason that it is not so

framed as to elicit any fact that would be competent evidence. If it were competent in such case to prove reputation, the proper question must be propounded to enable the witness to answer as to his knowledge of the plaintiff's *general* reputation, and not which was wholly immaterial, whether he had heard the plaintiff's character more frequently discussed before or after the action was commenced. (*Page v. Finley*, 8 Or. 45; *State v. Clark*, 9 Or. 467.)

Physician not required to testify. Dr. Saylor could not be required to disclose any facts which he learned in the course of his professional employment, nor could the plaintiff be prejudiced because he declined to answer those questions; and it was improper on the argument before the jury for the defendant's counsel to refer to the matter, or to animadvert upon the plaintiff's failure to consent, or insist that Dr. Saylor should tell all he knew about the facts. No such duty or obligation was placed upon her by any law, and unless it can be shown to exist she could not be prejudiced by her silence. Nor is this all. It is upon the evidence which is admitted to go to the jury that a cause must be tried, and not upon that which is excluded. (*Carne v. Litchfield*, 2 Mich. 343; *State v. Andrews*, 10 Or. 456.) These exceptions cannot be sustained.

The defendant testified that he never at any time promised to marry the plaintiff, but had had sexual intercourse with her, for which he paid her money at the time or times of such intercourse; and there was evidence tending to show that the plaintiff was unchaste after December, 1877, and that the defendant had knowledge of it prior to the last alleged postponement of said marriage.

Several witnesses on the part of the defendant were called, whose testimony tended to show that the general reputation of the plaintiff for chastity and virtue among her acquaintances since December, 1877, and up to the commencement of this action, was bad. The defendant also introduced testimony tending to show that the plaintiff was a coarse and vulgar woman; that she rented her property for saloons, barber shops, and a variety theater, and that for several months in 1885 a part of her building

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near her dwelling was rented to an Italian who rented rooms therein for women or girls for lewd purposes; and that she herself had asked one person where he got his "skyving" when he came to Portland, and that at times she used profane language.

The court, among other things, charged the jury as follows: "It is necessary in order that the defense of lewd conduct on the part of the plaintiff to become available to the defendant should have come to his knowledge after this last postponement. If not, it is not available to him." The court further charged the jury on the same subject as follows: "If he knew at the time of the last postponement of this marriage that she had such a character as he has attributed to her in his answer, and still repeated the promise and agreed to marry her in July, or at any time after that date, he cannot avail himself of a want of chastity on her part (if it existed) as a defense." To each of these charges an exception was taken. By these charges the court, in effect, told the jury that if the plaintiff was a lewd woman, and the defendant knew it at the time of the promise or of any renewal thereof, then such fact would not constitute a defense to the action. There is no error in this. If a man knowingly will enter into a marriage contract with a lewd woman, he is bound to perform his agreement or pay such damages as a jury may deem proper under all the circumstances of the case. To hold otherwise would be at variance with the settled rule of the law on the subject. (*Espey v. Jones*, 37 Ala. 379; *Berry v. Bakeman*, 44 Me. 164; *Butler v. Eschleman*, 18 Ill. 44; *Clarke v. Reese*, 35 Cal. 89; *Burnett v. Simpkins*, 24 Ill. 264; *Bell v. Eaton*, 28 Ind. 464; *Snowman v. Wardwell*, 32 Me. 275.)

The appellant also excepted to the following portion of the charge to the jury: "And further than that, you should take into consideration this attempted defense and failure to establish it. But the manner in which this is to be taken into consideration, and the question by which you are to consider it, you will observe in assessing damages. If he made this charge against her knowing that it was untrue, that is, the general want of chastity and intercourse with other men, knowing that it was untrue, and having no reasonable ground to believe that it was

true, or if he made the charge with the belief or supposition on his own part that nobody else had been having intercourse with her besides himself, then the failure to prove the allegation and the fact of his own intercourse with her ought to be taken by you in aggravation of the charge and in aggravation of the damages which should be assessed."

And the appellant's counsel also excepted to the following portion of the court's charge to the jury: "If, however, he made the charge in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and the conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers and of this belief that he had entertained, then you should not allow that circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously." Another exception on the same subject was made by the appellant to the refusal of the court to give certain instructions to the jury asked by him, which are as follows: "The court is asked by the defendant to charge the jury that the defendant is entitled to set up the bad character of the plaintiff as a defense to this action."

Such defense the law allows to be made, and to be made available must be spread upon the records, that is, it must be pleaded.

"If the defendant sets up this defense in good faith under circumstances which would warrant a cautious attorney in the belief and expectation that it can be established by testimony, and if on the trial evidence is produced of a character proper to be submitted to the jury in support of the defense, the jury should not, either from sympathy with the plaintiff, in case you should find the weight of evidence in her favor, allow that circumstance to aggravate the damages. In other words, if, in making this defense, the defendant acts in good faith with probable cause and with a reasonable expectation that he can establish it, he should not be punished even if he fail."

It is also proper in this connection to set out the entire charge of the court on this point:—

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“Another matter of defense that after the date of the alleged contract of marriage between them she became and was a lewd woman, and the substance of that charge, is repeated in several forms, to the effect that she committed adultery at a certain place and at certain times with persons to the defendant unknown; another, that she kept a house of prostitution; another, that she habitually, for a considerable length of time, sold her person for hire—the whole of these allegations, amounting to a charge of gross lewdness, he says, came to his knowledge after the alleged contract of marriage was made. Now it is alleged in the complaint, and there is evidence tending to show it, that after December, 1877, this matter was in negotiation between the parties in the shape of postponements, repetitions of what the agreement was, and repetitions and promises that the marriage would be consummated at some future day after the date of the particular negotiations, and postponements were repeated and continued until April, 1885, at which time the same matter was again talked about and assented to—the contract assented to—and at the time postponed until some time in July of that year. These various postponements, if you believe that they took place in the manner alleged, may be considered by you as renewals of the contract, repetitions of it, and confirmations of it.

“It is necessary, in order that the defense of lewd conduct on the part of the plaintiff may become available to the defendant, it should have come to his knowledge after this last postponement, if not, it is not available to him; but of that I will speak further hereafter.

“Consider first now the defense of the release. There are various ways in which a release from a contract of this kind may be made. One way would be a proposition or request to the party defendant by the plaintiff that the defendant should marry some other person, and if you believe from this testimony and are satisfied that this plaintiff, on or about that time, in September, did request the defendant to marry her daughter—proffered her daughter to him in marriage—you are at liberty to conclude that a release was intended and made by the plaintiff of the defendant from the contract which she claimed before

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that to have existed with her. I say it would be a release if you find that fact, and are satisfied from the testimony that it existed. But the burden of proving that is on the defendant. He has alleged it, and he must make it out by testimony that is satisfactory to you. Proceeding to the other defense—want of chastity—the defendant has alleged it, and then the rule applies to him again.

“The burden is on him to establish to your satisfaction if he knew at the time of the last postponement of his marriage that she had such a character as he has attributed to her in his answer, and still repeated the promise and agreed to marry her in July, or at any time after that date, he cannot avail himself of the want of chastity on her part, if it existed, as a defense.

“Something has been said in the testimony concerning his having cohabited with her during that time.

“I instruct that is no defense to him, if the promise of marriage existed. It is no release from its obligations or from liability from its breach, if he himself during the time subsequent to his promise was cohabiting with her, or if he knew that other persons were cohabiting with her, and assented to it so far as to renew the promise with her. Now as to the effect of this defense you are to consider (if you come to that), if you find that the promise of marriage existed and that this defense had not been made out—either of these defenses has not been made out—to your satisfaction, then it will become your duty to assess damages, and you are to take into consideration in assessing the damages all the circumstances that have been laid before you on the trial. Consider the parties, their ages, their standing in society, their pecuniary condition, the loss which the plaintiff sustains in worldly emoluments by the breach of the contract, if there has been a breach, the injury to her feelings, her prospects in life, the interruption which this contract has been, if any, to her business, by which she might have changed her affairs in life, all these circumstances must be taken into consideration by you.

“And further, that you should take into consideration this attempted defense, and the failure to establish it. But the man-

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ner in which that is to be taken into consideration, and the question by which you will consider it, you will observe in assessing damages. If he made this charge against her knowing that it was untrue—that is, the charge of general want of chastity and intercourse with other men, knowing that it was untrue—and having no reasonable grounds to believe that it was true, or if he made the charge with the belief or supposition on his own part that nobody else had been having intercourse with her besides himself, then the failure to prove the allegation, and the fact of his own intercourse with her, ought to be taken by you in aggravation of the charge, and in aggravation of the damages which should be assessed.

“If, however, he made the charge in good faith, believing that there were good grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he had renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he had entertained, then you should not allow this circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but you will take the circumstances all into view and inquire, if you come to that question, how has he made the charge? Has it been a reckless, a wanton, malicious charge, or has it been made in good faith? You will determine the question of the manner and *animus* of this defense, as well as the question of the amount of damages. I allude to one thing further concerning the pleadings. It is admitted by these pleadings that the plaintiff was ready and willing, in September, 1885, and since, up to the commencement of this suit, to marry the defendant, and it is admitted that she demanded marriage in September, 1885, and it is admitted that he refused; so that matter need not be inquired of, since it is admitted on the face of the record.”

The court further instructed the jury on the subject of damages:—

“If you find the contract was made, has been broken, and consider the question of damages, you may take into consider-

ation the character of the plaintiff, if it is subject to any criticism on your part, and if she is a woman of coarse manners, gross in her association, and imprudent, careless, and reckless in regard to her conduct and demeanor, these circumstances you may take into consideration in assessing damages; such a woman is not injured to the same extent by a breach of promise of marriage that one more confiding, retiring, and modest would be. Understand, that I am passing no judgment upon the plaintiff or suggesting that you shall pass any judgment upon her, but I wish you to understand that if you think she deserves consideration of that kind, it is to your privilege and duty to give such consideration to that phase of the matter as you think it deserves."

Counsel for the appellant now insist that the foregoing instructions given by the court do not present a correct view of the law to the jury, and they claim that the court should have told the jury explicitly that if the defendant set up his defense in good faith, believing it to be true, and having reasonable grounds to believe it to be true, they could not consider the fact in aggravation of damages. And to sustain their contention they cite *Powers v. Wheatley*, 45 Cal. 113; *Fidler v. McKinlay*, 21 Ill. 308; *Burnett v. Simpkins*, 24 Ill. 265; *Denslow v. Van Horn*, 16 Iowa, 476; *Leavitt v. Cutler*, 37 Wis. 46; *White v. Thomas*, 12 Ohio St. 312; *Rayner v. Kinney*, 14 Ohio St. 286.

Upon the other hand, counsel for respondent contend that when a defendant attempts to justify his breach of promise of marriage by stating upon the record as the cause of his desertion of the plaintiff that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages; and to sustain this position counsel for respondent cite *Thomas v. Knapp*, 42 N. Y. 475; *Southard v. Rexford*, 6 Cowen, 254; *Davis v. Slagle*, 27 Mo. 603; *Kniffen v. McConnell*, 30 N. Y. 285; *Johnson v. Jenkins*, 24 N. Y. 252; *Wills v. Padgitt*, 8 Barb. 323; *Burns v. Beach*, 1 Lans. 268; *Reed v. Clark*, 47 Cal. 203.

We do not feel called upon in this case to undertake to review or to attempt to reconcile any apparent conflict there may be in these cases. The court in its charge evidently might have gone

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further either way and found language in these cases to have sustained it. The court told the jury in effect that if the defendant made the charges set up in the answer in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he had entertained, then you should not allow the circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but you will take the circumstances all into view and inquire, how has he made the charge? Has it been a reckless, a wanton, malicious charge, or has it been made in good faith? You will determine the question of the manner and *animus* of this defense as well as the question of the amount of damages. This charge fairly submitted to the jury, on the one hand, the nature and character of the imputations cast upon the plaintiff, the manner and motives by which he was prompted; and on the other, the question whether or not the charges were made in good faith. The jury were bound to understand from this instruction that if there was no cause for making the charges, and the defendant was actuated by malice, wantonness, and recklessness, then they might add something to the damages on account thereof; but if otherwise — if good faith prompted the defendant — he was to have the benefit of it in estimating the damages. That is to say, the wrong which the plaintiff has suffered by having these groundless and most damaging charges spread upon the records of the court, where they must forever remain, is not wholly atoned for by the defendant's good faith, because good faith cannot atone for the wrong. Still it must be considered by the jury in estimating how much the defendant ought to pay for that wrong.

In this class of actions the damages are so entirely in the discretion of the jury that nothing but the most general rules of law can be applied. Though in form an action founded on contract, it partakes more of an action growing out of tort. There is no fixed rule of damages, and the jury may, in the

exercise of a sound discretion, allow punitive damages, that is, such an amount over and above all actual damages as in their opinion are proper, by way of punishing the defendant, and such as may tend to deter others from being guilty of the like breaches of a legal and social duty. And for the purpose of enabling them to reach a proper conclusion as to the amount of damages, they have a right to consider the entire course of conduct of the parties toward each other up to and including the time of the trial. There can be no doubt if the defendant's desertion of the plaintiff was without cause, or his conduct at the time toward her, or afterwards, was harsh, cruel, or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong. If the instruction asked by the appellant and refused by the court is good law, as to which it is unnecessary to express an opinion in this case, still its refusal was not error, for the reason that it was inapplicable to the particular facts disclosed by the bill of exceptions. If the plaintiff was unchaste or her life was impure after December, 1877, the testimony offered tended to show that the defendant knew it, and according to the defendant's own confession, he was equally guilty with her. This instruction wholly ignores the effect of the defendant's knowledge of the plaintiff's want of chastity, and his admitted criminal indulgence with her in its bearing upon the question of damages. If the defendant promised to marry the plaintiff knowing her to be unchaste, and then refused to perform his agreement for that reason, this fact would not constitute a defense. It might mitigate the damages, but it could not defeat the action. On the other hand, if the defendant himself had for a long time been in the habit of having sexual intercourse with the plaintiff, it is difficult to see on what ground he could charge her, "in good faith," with a want of chastity. It is believed that under the authorities, such conduct does not tend to mitigate, but greatly aggravates the damages. The defendant having testified upon the trial to his own improper conduct with the

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plaintiff, could not wholly ignore the possible effect such evidence might have on the minds of the jury. It was evidence tending to prove the defendant's allegations, or some of them, that the plaintiff had led an impure life, at least in the particular instances mentioned by the defendant. What effect that evidence might have on the amount of damages to be awarded to the plaintiff, if any, was entirely for the jury; but the necessary effect of the instruction asked was virtually to withdraw the consideration of these particular facts from the jury, and to treat the case precisely as though no such evidence had been given. This we think the defendant was not at liberty to do. In addition to this, there was no evidence offered upon the trial tending to prove any of the criminal conduct charged against the plaintiff in the defendant's answer, except her conduct with the defendant himself. In the absence of such proof, or some proof tending to establish the facts alleged, it is not perceived on what grounds the defendant could predicate his good faith. Those charges are of most serious import and ought not to be lightly made, and when made, a defendant ought to be able to show some cause for making them; in other words, he ought to be able to offer some evidence which would tend to prove the charge. Here there is no evidence whatever tending to prove these particular charges, except the defendant's evidence as to his own criminal conduct. In this respect, also, the refusal of the instruction was correct because it was too broad. It included matters upon which no evidence had been offered. It follows that the judgment appealed from must be affirmed.

On petition for rehearing.

STRAHAN, J.—In disposing of a question of practice which was presented in this case, it is said in the prevailing opinion: "The exception taken to the refusal of the court to allow the witness, Fred Meyer, to answer the question propounded to him is not available. The witness did not answer, and it nowhere appears from the bill of exceptions what fact appellant expected to elicit by the question. To make this exception available, the bill of exceptions ought to have gone further and shown what it

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was expected to prove by the answer to this question. And the same remark is applicable to the question propounded to the witness, Dr. H. W. Ross, which was excluded."

In his petition for rehearing, this statement of the law is questioned by counsel for appellant, which has led to a re-examination of the subject, the result of which is, the affirmance of the ruling upon the authority of the following cases: *Bake v. Smiley*, 84 Ind. 212; *Whitehead v. Mathaway*, 85 Ind. 85; *Jordan v. D'Heur*, 71 Ind. 199; *The Toledo and Wabash Ry. Co. v. Goddard*, 25 Ind. 185; *Watson v. Mathews*, 36 Tex. 278; *Sacramento and Nev. Mining Co. v. Small*, 40 Me. 274; *State v. Staley*, 14 Minn. 105; *Mathews v. The State*, 44 Tex. 376; *Lewis v. Lewis*, 30 Ind. 257; *Stull v. Wilcox*, 2 Ohio St. 569; *Hallister v. Riznor*, 9 Ohio St. 1; *Gandolfo v. The State*, 11 Ohio St. 114; *Gage Manuf. Co. v. Parr*, 138 Mass. 462; *Grarter v. Williams*, 55 Ind. 451; *Mitchell v. Chambers*, 55 Ind. 289. The general rule of law which these authorities tend to sustain is thus stated in *Grarter v. Williams*, *supra*: "But where a party on the trial of a case has propounded a question to a witness with a view of eliciting evidence, to which question objection has been sustained by the court, such party cannot, by simply saving an exception to the decision of the court, in sustaining such objection, get error into the record, which will be available to him in this court.

In such case the party must go further, and state to the court in which his cause is being tried, clearly and explicitly, what the evidence is which he offers to adduce, and which he expects to elicit "by the answer of the witness to the question." And in *State v. Staley*, *supra*, the rule is thus stated: "To justify a reversal of judgment, the record must show affirmatively material error. When a question is asked which is objected to, and the objection sustained, in taking an exception it should be made to appear what it was proposed to prove, which must be something material, and the rejection of which as evidence would be prejudicial to the party excepting." And the same principle is enunciated in *Gandolfo v. The State*, *supra*, thus: "When a question is objected to, and the objection sustained in taking an

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exception, there should be a statement of what it was proposed to prove, which must appear to be something material, and the rejection of which as evidence would be prejudicial to the party excepting."

We have given the appellant's petition for a rehearing a careful examination, and find no reasons for modifying the opinion already filed in this case. No new questions are suggested, and those already considered do not require a further examination. A rehearing would only lead to the result already reached by a majority of the court; it should be denied. And it is so ordered.

THAYER, J., concurring. — The action in the court below was for a breach of marriage contract between the parties herein, alleged to have been made on the seventeenth day of December, 1877, and the celebration thereof, to have been postponed at various times during the subsequent years, down to on or about the sixth day of April, 1885; that such contract was entered into by the appellant and respondent must, for the purposes of this appeal, be taken as true. The finding of the jury in any view of the case is conclusive upon that point. This court must assume that the appellant and respondent agreed to intermarry, and that the appellant violated the agreement as alleged in the complaint. There is no claim that the Circuit Court did not fairly submit that question to the jury; and that they found such to have been the fact by their finding for the respondent cannot be denied at this time. There are but two matters, therefore, which need be considered. The one is the matter of defense as a bar; the other, the matter of partial defense or mitigating circumstances. The appellant alleged in his answer the following new matter:—

"Defendant, for a further and separate answer and defense, alleges that on or about the eighteenth day of September, 1885, the plaintiff voluntarily abandoned said alleged marriage contract, and voluntarily and wholly released the defendant from all obligation she claimed against him under said pretended alleged contract before said date.

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“And for a further and separate answer and defense, the defendant alleges that after the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a woman of *bad reputation for chastity*; and *became and was* reputed to be an unchaste woman; and so conducted herself in intercourse with men, as to establish for herself the reputation of a common or lewd woman, and was so reputed to be for more than five years before the commencement of this action.

“And for a further and separate answer and defense, the defendant alleges that *after* the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a common prostitute, and continued to deport herself as such for more than five years before the commencement of this action, at and about buildings occupied, used, and controlled by her about the corner of B and First streets, in the city of Portland, Multnomah County, Oregon.

“And for a further and separate answer and defense, the defendant alleges that *after* the date of the pretended contract alleged in the complaint, the plaintiff committed the crime of adultery, and did have carnal sexual intercourse on or about the twenty-fifth day of April, 1885, at her residence near the corner of B and First streets, in the city of Portland, Multnomah County, Oregon, with a man whose name to this defendant is unknown, and as to whose identity he is unable to make any more particular statements.

“And the defendant, for a further and separate answer and defense, alleges that on or about the twenty-fifth day of December, 1884, at her place of residence near the corner of B and First streets, in the city of Portland, Multnomah County, Oregon, the plaintiff committed the crime of adultery, and did then and there have carnal sexual intercourse with a man whose name is to this defendant unknown, and to whose identity he is unable to make any more particular statements.

“And the defendant, for further and separate answer and defense, alleges that after the dates of the pretended contracts set out in the complaint, the plaintiff, at her place of dwelling near the corner of B and First streets, in the city of Portland,

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Oregon, did for more than five years next preceding the commencement of this action carry on the business of selling the use of her person in sexual intercourse with men for hire, and at divers and sundry times, and from time to time during said five years, did commit the crime of adultery in carrying on such business, and did have carnal sexual intercourse with divers and sundry and numerous men whose names are to this defendant unknown, *which unlawful conduct of claimant came to defendant's knowledge since December 17, 1877.*"

No attempt was made to plead a partial defense. Proof was submitted upon the part of the appellant tending to show that the respondent was coarse in her manner and conversation, gross in her associations, and imprudent in her conduct and demeanor; that she rented her property, consisting of buildings situated near her own residence, to persons of questionable reputation; that her character for chastity and virtue was not good in the community where she was known; and that upon one occasion she made a vulgar and lewd inquiry of a male acquaintance whom she met upon the streets of Portland; but no proof was made tending directly to establish the charges of adultery and prostitution contained in the answer; nor does it appear that any evidence was offered by the appellant for the avowed purpose of mitigating the damages. All the proof upon his part seems to have been offered in view of the defenses set forth in the answer, and which were controverted by the respondent. In that condition of the controversy the case was submitted to the jury. It is evident to my mind that the defenses referred to were not only unproven, but that the evidence offered, standing by itself, was inadmissible for that purpose. It cannot, certainly, be maintained that the defense, that the respondent, after the date of the alleged contract of marriage, became and was a woman of bad reputation for chastity, etc., could be established by proof that her reputation was bad in that respect, without showing that it became bad after the time alleged; nor that the defense, "that after the date of the pretended contract alleged in the complaint the plaintiff committed the crime of adultery, and did have carnal sexual intercourse on or about the 25th day of April,

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1885, at her residence, near the corner of B and First streets, in the city of Portland," was established, by proving that she was a coarse woman, etc., as before mentioned; such proof may have been material evidence in the case—may have shown that the respondent was not entitled to damages beyond one cent—but, clearly, it did not make out the defense alleged, and for that purpose was wholly futile. There is a wide difference in proof tending to show that the plaintiff, since the making of the contract of marriage, had done acts that legally absolved the defendant from observing it, and proof that tended to show that the plaintiff was such a coarse, vulgar woman that she had not been damaged in consequence of a breach of the contract; but in the trial of this case, no such distinction seems to have been kept in view. In such a case, where a defendant has interposed a specific full defense, and offers evidence generally, which is objected to as irrelevant and immaterial, and which is insufficient to prove such defense, but is relevant to prove mitigating circumstances, he should declare the purpose for which he offers the evidence if he wants the benefit of it upon the latter ground, otherwise it would necessarily lead to confusion. The presiding judge at the trial usually announces in such cases that he will permit the evidence, though offered generally in the action, to be received in mitigation of damages, but he may not always be able to make the discrimination, nor the defendant's counsel be willing to accept of such ruling. An exception to be tenable in such a case must be taken to the refusal to admit the evidence after the party producing it indicates the purpose for which it is offered. The mode here suggested is calculated to prevent the embarrassment to which the jury would be liable to be subjected if the evidence were admitted without specifying the object for which it is introduced, and the attention of the court will then be directed, in case of objection to its admission, to the particular point upon which it is called upon to rule. The appellant, in my opinion, should not be heard to complain when evidence, that is inadmissible to prove the defense alleged, is excluded upon that ground, although admissible in mitigation of damages, where it does not appear that he sought to have it admitted upon

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the latter ground. One of the questions in the case which has raised some doubts in the mind of the court, relates to the charge to the jury in regard to their taking into consideration the attempted defense, and failure to establish it, in the assessment of damages. The court, in its instructions, told the jury in substance that if the appellant made the charge against the respondent of general want of chastity and intercourse with other men, knowing that it was untrue, and having no reasonable grounds to believe that it was true, then the failure to prove the allegation ought to be taken by them, in aggravation of the charge, and in aggravation of damages which should be assessed. If, however, the appellant made the charge in good faith, believing that there were grounds for it, and the conduct of the respondent had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he entertained, then they should not allow that circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but that the jury should take the circumstances all into view and inquire, if they came to that question, how had he made the charge? Had it been reckless—a wanton, malicious charge—or had it been made in good faith? The appellant's counsel contend that the part of the instruction here referred to is erroneous, as it allowed the attempted defense, and failure to establish it, to weigh to some extent in the assessment of damages, even though the jury should find that the appellant made it in good faith. This seems to be the main ground of error in the case.

The Circuit Court evidently entertained the view that the failure to establish such a defense, if interposed in bad faith, knowing that it was untrue, etc., would aggravate the damages; that if interposed in good faith, under the belief that it was true, it would have less weight in the assessment of damages; but the court did not indicate how it would affect the subject in the latter case. The inference, however, is that the failure to prove such defense might be considered by the jury as a circumstance,

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in connection with the other circumstances referred to them by the court, to be taken into consideration in fixing the amount of damages, in event the respondent was found entitled to damages. Said counsel insist that if the defense is made in good faith, and upon probable cause, it is not to be considered by the jury in aggravation of damages at all. The instruction, however, does not include the hypothesis of there being probable cause for believing the defense to be true. The statement contained in the instruction is: "If the appellant made the charge in good faith, believing that there were grounds for it, and the conduct of the respondent had been so imprudent as to furnish him grounds for it," etc. And I think the supposition the court submitted contained a much broader statement than the facts in the case would justify. It would have required, it seems to me, a great amount of credulity upon the part of the jury to have believed that the charge was made in good faith. The appellant may have believed that the respondent was an unchaste woman; but there is nothing in the evidence to justify his allegation that she committed adultery at particular times and places, and his making such allegations without being able to produce any direct evidence of the fact, and making no attempt to prove specifically such charges, placed him in a very difficult position to claim that he made them in good faith. In view of the evidence, the jury were bound to conclude that those charges were false, and I am unable to discover how they could have found otherwise than that they were malicious. It was not pretended, as I understand the case, that in making the charges he acted upon any information he had obtained concerning the facts alleged. I refer to the specific facts concerning the adultery charged in the answer. He seems to have "just fired at random." Had there been probable cause for making the charges, the counsel's position might have been tenable; but I am unable to discover that there was any, and the court did not submit that question to the jury in the instruction. We must take the instruction as we find it; also the charge made by the appellant against the respondent's general want of chastity and intercourse with other men, and the evidence in the case in testing the correctness of the instruction.

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The case before us is one in which the defendant has attempted to justify his breach of promise of marriage by alleging against the plaintiff in his answer, that since the time of the making of the promise she became and was a common prostitute, and continued to deport herself as such for more than five years before the commencement of the action, in and about a particular place; that she had been keeping a "whore-house," in fact, and been an out and out strumpet, and at particular times and places had carnal intercourse with men, had committed adultery, and been engaged in the business of selling the use of her person in sexual intercourse with men for hire. He spread upon the records of the court, in strong and unmistakable terms, a damaging libel, and without proving its truth, attempted to shield himself from the entire consequences of his act, by claiming that he published it in good faith, believing it to be true. What could be evidence of good faith upon his part, less than proof that the allegations were true, or, at least, that there was a good foundation for believing them true? And if he believed them to be true, honestly entertained such a belief, how does that compensate the wrong he has done the respondent by declaring such scandalous matter perpetuating forever the evidence of it? Such an act ought, it seems to me, have some weight in the assessment of damages, even under the circumstances supposed by the court. Besides, it is perfectly evident that the appellant was not damaged by that qualification of the instruction. An alternative made to depend upon the jury, finding that the appellant acted in good faith under the circumstances, was wholly valueless.

Another important question in the case is the refusal of the court to give the following charge to the jury: "The court is asked by defendant to charge the jury that the defendant is entitled to set up the bad character of the plaintiff in defense to this action. Such defense the law allows to be made, and to be made available must be spread upon the records, that is, it must be pleaded. If the defendant sets up this defense in good faith, under circumstances which would warrant a cautious attorney in the belief and expectation that it can be established by testimony, and if on the trial evidence is produced of a character proper to

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be submitted to the jury in support of the defense, the jury shall not, either from sympathy with the plaintiff, in case you should find the weight of evidence in her favor, allow that circumstance to aggravate the damages. In other words, if in making this defense the defendant acts in good faith with probable cause, and with a reasonable expectation that he can establish it, he should not be punished even if he fail."

Which instructions the court refused as asked, but instructed the jury concerning those matters as set forth in the general charge, to which refusal counsel for appellant excepted.

This proposed instruction, as an abstract proposition of law, I am inclined to think is substantially correct. The grounds upon which the court refused it do not appear, but it is evident to my mind that the facts in the case, as I have before intimated, did not entitle the appellant to have it given. There were six defenses interposed. The first one, a voluntary abandonment by the respondent of the marriage contract, and release of the appellant from the obligation thereof. The next two of them were alleged facts, that after the date of the contract the respondent became and was a woman of bad reputation for chastity, etc., and that she became and was a common prostitute. The other three relate to specific acts of adultery and prostitution with which the appellant charged her. There is no pretense but that the defenses which claim that she abandoned the contract, or that she released the appellant from the obligation of it, were not fairly submitted to the jury; nor any evidence that she became or was, after the date of the contract, a woman of bad repute, or after such date became or was a prostitute. Testimony was given on the part of the appellant tending to show that the general reputation of the respondent for chastity and virtue since the date of the contract was bad, and an offer made to show that it was bad before that time; but there was nothing showing that it became bad after the date of the contract, as alleged in the answer. This may not seem important—the time her reputation became bad—and yet it is so as a defense to the action. The fact that a woman has a bad reputation for virtue does not entitle a man to violate a contract of

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marriage he has entered into with her if he knew what her reputation was when he made the contract, though the fact may be shown in mitigation of damages, where it is offered for that purpose. The appellant claimed that he was relieved from the obligation of the contract for the reasons set out in said two answers, and the evidence he offered was immaterial as a defense, unless in accordance with the allegations therein contained. He probably was not able to deny but that he knew what her reputation was, and had been, at the time of and prior to the contract of marriage, and hence, it was necessary to allege that it became bad after that date. But, conceding that the evidence offered tended to establish those two defenses, what was there in the testimony to prove the other three. Evidence of her bad reputation, and that she was a coarse, vulgar woman, would have no tendency to prove that she committed adultery at some particular time and place, "or sold the use of her person." It would be absurd to claim any such thing, and yet, as I understand, that is all there was in the case to establish said defenses. "Probable cause" is supported by evidence which inclines the mind to belief, it is not a mere suspicion. It is something that is proved, not fully, but has more evidence for than against it. What was there in this case to show that the respondent committed adultery on the 25th day of April, 1885, or the 25th day of December, 1884, or that she carried on the business of selling the use of her person? Not anything that could be called proof, certainly. If she had been prosecuted for adultery, or for keeping a house of ill-fame, would any court have allowed the case to have gone to the jury on such pretended evidence as the appellant introduced in this case? It is idle to consider such a question. The New York courts, by an unbroken series of decisions from *Southard v. Rexford*, 6 Cowen, 254, down to the present time, have held, that where the defendant attempts to justify his breach of promise of marriage by stating upon the record, as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving such justification, it is a circumstance which ought to aggravate the damages. This doctrine, counsel

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for the appellant claims, is subject to the qualification set out in the said instruction asked and refused, and I rather think he is right in that view; but I do not see how the distinction can be made in this case, for I do not think that three at least of the defenses were interposed with probable cause, or with a reasonable expectation that the appellant could establish them. To vilify and calumniate the respondent by vile charges which he must have known he could not maintain, ought not to be condoned by a plea that he did it innocently, and without intending harm. But he should make it appear, from evidence submitted upon his part, that he had reasonable grounds to suppose the charges could be established. I do not believe a party defendant, in such a case, should be prevented from setting up what he believed the facts would authorize him to, and that he had reasonable grounds to suppose he would be able to prove, but when he acts upon conjecture only, and alleges matters injurious to the credit and reputation of the plaintiff, upon a mere surmise that they might be true, he abuses the privilege the law confers upon him of making a defense, and, as said in *Southard v. Rexford*, *supra*, "it would be a matter of regret, indeed, if a check upon a license of this description did not exist in the power of the jury to take it into consideration in aggravation of damages." In my opinion, a defense which charges scandalous matter, and is not sustained, in order to avoid the imputation of malice, or, at least, wantonness, the law would presume, must be founded upon probable causes supported by proof, that distinctly or by necessary inference tends to establish its truth. Any less requirement would encourage an abuse of the privilege the law confers. No such proof having been submitted in this case, or facts shown from which it could legitimately be inferred, the assignment of error in regard to the charge of the court, and refusal to charge as requested, referred to herein, are not sustained.

The other grounds of error I do not regard as tenable. The petition for a rehearing should therefore be denied.

Argument for Appellant.

[Filed June 14, 1887.]

ABBY R. CLARK, APPELLANT, v. MARY A. PRATT
ET AL., RESPONDENTS.

TRUST, RESULTING—EVIDENCE TO ESTABLISH.—The court will not declare a trust where one of the parties to the transaction is dead, and the evidence of the other—the only witness—is uncertain and unsatisfactory, and a long time is suffered to elapse before the commencement of the suit.

APPEAL from Wasco County. Affirmed.

Dufur & Dufur, for Appellant, cite on constructive trusts, 1 Perry on Trusts, 17; 1 Pomeroy's Equity Jurisprudence, § 155:

A trust results the instant the deed is taken. (1 Perry on Trusts, §§ 133, 1261; *Settembre v. Putnam*, 30 Cal. 490; *Roberts v. Ware*, 40 Cal. 634; *Coates v. Woodworth*, 13 Ill. 634; *Simpson v. Eckstein*, 22 Cal. 580; *Reeve v. Strawn*, 14 Ill. 94; *Hidden v. Jordan*, 21 Cal. 93; *Follansbee v. Kilbreth*, 17 Ill. 522; *Somers v. Overhulser*, 67 Cal. 237; *Millard v. Hathaway*, 27 Cal. 119; *Case v. Coddington*, 38 Cal. 191; 2 Story on Equity Jurisprudence, § 1201; *Springer v. Young*, 12 Pac. Rep. 400; also as to heirs, etc., also on homestead uncompleted, p. 172; *Currey v. Allen*, 34 Cal. 354.)

A part of the purchase money paid by another there is a resulting trust as to that part. (*Somers v. Overhulser*, 67 Cal. 237; *Keyser v. Mangham*, 7 West C. Rep. 21; *Hidden v. Jordan*, 21 Cal. 93; *Case v. Coddington*, 38 Cal. 191; Hill on Trusts, 115.)

The trust may be proven by parol. (1 Perry on Trusts, §§ 137, 226; *Smith v. Butler*, 11 Or. 46; *Millard v. Hathaway*, 27 Cal. 119; Code, § 771, p. 264.)

Statements of a deceased are admissible against his interest. (Code, § 679, p. 2471; Greenleaf on Evidence, §§ 147, 153, 169, 189.)

The Statute of Limitations does not begin to run until the discovery of the fraud. (Code, § 178, p. 189, as amended 1878, p. 25; 1 Perry on Trusts, §§ 137, 226.)

Statute of Frauds does not extend to trusts created or declared by the parties. (1 Perry on Trusts, § 137.)

15	304
25	332
14*	418
35*	847
15	304
28	83

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Gates & Bradshaw, for Respondents.

In all cases the allegation and proof must agree. (1 Perry on Trusts, §§ 133, 134, 137; 1 Hare & Wallace Pl. Cas. in Eq. 292; *Harksken v. Harsevered*, 7 N. W. Rep. 749; 2 Pomeroy's Equity Jurisprudence, § 1040, and notes.)

Where a resulting trust is sought to be established by parol evidence, in a case where the consideration money is expressed in the deed to have been paid by the person in whose name the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase money belonged to another, the uncorroborated parol evidence of the plaintiff, after the death of the grantee in the deed, is insufficient to establish a resulting trust. (2 Story on Equity Jurisprudence, 634, 635.)

The Statute of Limitations will run in favor of a trustee from the time he ignores or disclaims the trust. (*Geholard v. Sattlar*, 40 Iowa, 152; 2 Story on Equity, § 1520; *Otto v. Schlaapkaht*, 10 N. W. Rep. 649; Angell on Limitations, §§ 178, 469, 472.)

Equity will not raise a trust on an unlawful contract or agreement. (*Clark v. Bailey*, 5 Or. 343; Perry on Trusts, § 131.)

STRAHAN, J.—This suit was originally commenced by Henry B. Sampson as plaintiff. Its object was to ascertain and declare a resulting trust in certain real property, situate in Wasco County, in favor of the plaintiff. The complaint in substance alleges that in 1872 said Sampson bargained with W. D. Gilliam for the real property in controversy for the price and sum of twelve hundred dollars; that L. E. Pratt, the ancestor of defendants, wished to have one half of said land, and it was agreed between said Sampson and Pratt that each should pay one half the purchase money, and that a deed for said land should be taken in their joint names; that Sampson was obliged to return to Yamhill County, where he now and for thirty years last past has resided, and that Gilliam was obliged to go to Oregon City before said deed could be executed; that said land was a homestead claim, upon which said Gilliam had not resided for the full period of five years at the date of said contract, and that he thereafter continued his residence on said

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land with L. E. Pratt until his residence was completed, and then obtained a patent therefor, and that he thereafter executed a deed to said Pratt for said land; that said Sampson left six hundred dollars with said Pratt to pay for one half of said land, and that Pratt, intending to defraud the plaintiff, contrary to his agreement, took the deed to said land in his own name; that soon after the execution of said deed, Sampson inquired of Pratt about the purchase of said land, and was assured by Pratt that the deed had been taken in their joint names as had been agreed, and had been recorded; that Sampson relied upon this information and believed it to be true, and did not know of Pratt's fraud in taking the deed to himself until after Pratt's death, and in 1885; that Sampson paid taxes on said land until 1875, at which time he made a contract with Pratt that he should pay the taxes out of the proceeds of Sampson's property, which Pratt did; that Sampson had known Pratt for many years and had great confidence in him, and believed him to be honest, and intrusted to him a large number of cattle and horses; that before and about the time of the purchase of said land, Sampson intended to and did bring cattle and horses from the Willamette Valley, and run them upon the land, and that when Pratt took an interest in the land he was to have an interest in the cattle; that Sampson furnished nearly all the cattle—Pratt but few—and they were all put in one band and run as the company cattle of Sampson and Pratt; that in 1874 Sampson had become equal in the cattle, and that Pratt was to occupy all of said land, and for the use of Sampson's interest therein was to care for a few mares and their increase, then on said land and owned by said Sampson, and that thereafter Pratt occupied said land and cared for said horses as rental therefor until his death; that until 1874 Sampson visited said land annually, since which time he has been, and is now, unable to make such visits by reason of sickness; that after Pratt's death, his widow and heirs continued to reside upon said land, and their administrator delivered to said Sampson said mares and their increase. The answer puts in issue all of the material allegations of the complaint. The trial in the court below resulted in a decree for the defendants, dismissing the

suit, from which decree this appeal is taken. The evidence was reduced to writing upon an order of reference for that purpose, and accompanies the transcript, and the cause has been fully heard here upon the entire record. After the appeal was perfected, Henry B. Sampson died intestate, and on the application of his next of kin and heirs at law the suit has been revived in this court in their names.

The plaintiffs' case rests entirely upon the evidence of Henry B. Sampson. An examination of his testimony leads us to the conclusion that it is too uncertain and unsatisfactory upon which to base a decree, and especially so, when the suit was not commenced until after Pratt's death. Sampson's statements are entirely wanting in that precision and certainty which equity will always exact and require before disturbing a legal title. In addition to this, the great lapse of time which has intervened since the making of the deed and the commencement of this suit cannot be overlooked. Of course this is not decisive against the plaintiffs, but if unexplained, it is an element which must weigh against them. Sampson evidently realized this and sought to make such explanations as he might, but they are entirely unsatisfactory. Assuming that he was unable to return to Wasco County after 1874 by reason of sickness, it could hardly be possible during the eleven years that Pratt lived on the land and managed Sampson's business for him, that he would never have written a single letter to Sampson, or sent him a tax receipt or any memorandum or statement of their business. And yet, so far as appears, during all of that time, these parties never had any communication whatever, by letter or otherwise. The circumstances surrounding the whole transaction are all against the plaintiffs, and we do not think they are accounted for or explained in any satisfactory manner. We do not find it necessary to discuss any of the legal questions presented, but decide the case solely on the insufficiency of the plaintiffs' evidence to make out a case that would entitle them to any relief whatever.

Let the decree of the court below be affirmed.

Argument for Appellant

[Filed June 18, 1887.]

S. A. NEPPACH ET AL., RESPONDENTS, v. W. P. JORDAN,
APPELLANT.

LEASE—LANDLORD AND TENANT—WHAT IS NECESSARY TO CREATE.—To create such relation, the defendant must have entered into possession in subordination to the owner's title, and with his consent, express or implied.

SAME.—When the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the relation of landlord and tenant exists, and the possession is lawful until it is lawfully terminated.

SAME.—A person who enters without any lease or consent from the owner is only a trespasser, and is entitled to but ten days' notice, whether the occupation be for agriculture or not.

SAME.—An instruction to the jury that if they found that the defendant entered into possession of the premises without the consent of the owner, but by an arrangement with a former tenant, before such former tenant's term expired, the defendant would be holding over under the former tenant's lease, and be only entitled from that fact to ten days' notice to quit. *Held*, to be error as misleading, when it appeared that the defendant had no assignment from the former tenant, who was a lessee of the owner, but simply by consent of both the former tenant and the owner, entered upon the premises and occupied them jointly with the former tenant until the expiration of his lease, when he vacated the premises. The defendant's rights could not depend at all upon the terms of the former tenant's lease.

SAME.—It was not error to refuse to instruct the jury that if they found that the defendant occupied the premises in question for agricultural or farming purposes, he would be entitled to ninety days' notice to quit, as the instruction assumed that the occupation was with the consent of the owner, and that being in dispute, was a question of fact for the jury to determine.

APPEAL from Multnomah County. **Reversed.**

Doud & McCoy, for Appellant.

Chapter 20 of the Miscellaneous Laws of Oregon is derogatory of the common law, and should be strictly construed. (*Houser v. Keiser*, 8 Cal. 499; 52 Barb. 198; 58 Barb. 270.)

Forcible entry and detainer and forcible detainer only are separate causes of action (*Valence v. Couch*, 32 Cal. 341); and the issues raised by these pleadings are the latter only, and the court should have charged in reference to that issue. (*Merrill v. Forbes*, 23 Cal. 379; *Schilling v. Holmes*, 23 Cal. 227.)

Chas. H. Hewitt, for Respondents, cites §§ 11, 12, and 13, ch. 23, Misc. Code, subd. 6; § 775, tit. 8, ch. 8, Code.

LORD, C. J.—This was an action of forcible detainer commenced in a Justice's Court, and in which judgment was rendered for the plaintiff, and by the defendant appealed to the Circuit Court. A trial was had and a verdict was found against the defendant of guilty, upon which judgment was rendered in favor of the plaintiff for the possession of the premises described in the complaint. From this judgment the defendant has appealed to this court. The error assigned relates to certain instructions given, and the refusal to give one asked, and the substitution by the court of another in lieu thereof. Briefly, it may be said that it appears by the bill of exceptions that the evidence of the plaintiff tended to show that the defendant had entered into the possession of the premises without his consent, and without any lease or agreement, written or verbal, therefor, and had refused to deliver the possession of the premises after demand and notice to quit, and had said to the plaintiff that he would "defend his possession with the gun." On the other hand, the defendant, after denying the complaint, alleged affirmatively, and his evidence as disclosed by the bill of exceptions tended to show, that the plaintiff had verbally agreed to give him a written lease for the premises for five years for agricultural purposes; and that he consented if he, the defendant, could make arrangements with one Pike, who was then in possession of the premises under a lease which expired within a month, he might enter thereon, and that in pursuance thereof he effected such an arrangement with Pike, and was in possession of the premises when Pike's lease expired and he quit the premises; but that the plaintiff had refused to make the lease as he had agreed. There was also evidence tending to show the character of his occupation, and the various things he did while thus occupying it, based on the expected or promised lease. It was admitted that ten days before the commencement of the action, the plaintiff had served a written notice upon the defendant, demanding the possession of the premises. This was after Pike's lease had expired, and the defendant was in the possession of the land. It will be seen, then, that the plaintiff claimed that he was entitled to the possession of the premises when Pike's lease

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expired, as the defendant had occupied them without his consent, for any purpose, agricultural or otherwise, and had refused to deliver the possession, and threatened to defend it; while the defendant claimed the facts to be as stated, and that his possession was with his (plaintiff's) consent, and for agricultural purposes, and that, therefore, he was entitled to ninety days' notice instead of ten days' notice, as given. The theory of the defendant is that the relation of landlord and tenant existed between the plaintiff and himself.

Consent necessary to create tenancy. To create that relation, the defendant must have entered into the possession of the premises in subordination to the plaintiff's title, and with his consent, express or implied. A mere agreement for a lease does not create a tenancy, or give to the party with whom it is made a right to the possession (*Billings v. Canney*, 57 Mich. 425); but where the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the case is different, and the relation of landlord and tenant does exist between the parties. In such case his possession is lawful until it is properly terminated. Our statute provides that an action for the recovery of the possession may be maintained in the case specified in subdivision 2 of section 11, when notice to quit has been served upon the tenant or person in possession for the period of ten days before the commencement thereof, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for the period of ninety days before the commencement of the action. (Misc. Laws of Or. Code, § 13, p. 615.) Subdivision 2 of section 11, referred to, provides that after a notice to quit, etc., "or without any written lease or agreement therefor," shall be deemed a case of unlawful holding by force. Now the defendant contends that his possession or occupation of the premises was with the consent of the plaintiff and in subordination of his title, under a verbal promise or agreement with him to execute a lease for five years for agricultural purposes, which subsequently to his occupation, made in pursuance thereof, the plaintiff refused to make, and that he is, therefore, within the purview of the statute cited,

a tenant or person in possession or occupation of the lands for the purpose of agriculture, and entitled to ninety days' notice.

A trespasser only entitled to ten days' notice. The court charged the jury that "if they found that the defendant entered into possession of said premises without the consent of William Neppach (the plaintiff), when Neppach was entitled to the possession, then he would be a mere trespasser, and would not be entitled to but ten days' notice, and it would make no difference whether the premises were agricultural lands or not." As the plaintiff was entitled to the possession of the premises upon the expiration of Pike's lease, unless he had given his consent to the occupation of the premises by the defendant, under the circumstances indicated, it would seem to follow, if he had not given such consent, and the defendant had entered and held the possession when the plaintiff was entitled to it, that the defendant was a trespasser, and not entitled to the notice he claims. This is the effect of the instruction, and in this, we think, there was no error. The court further charged the jury that "if they find the defendant entered into the possession of said premises without the consent of William Neppach, but through an arrangement with Pike before Pike's term expired, then he would be in lawful possession, but would be holding over under Pike's lease, and consequently, would only be entitled to ten days' notice, and that it would make no difference whether the premises were agricultural lands or not." This instruction is based on evidence offered both by the plaintiff and the defendant. But the conclusion which it reaches that the defendant in the case stated would be holding over under Pike's lease, and only entitled to ten days' notice to quit, etc., is hardly correct, and is calculated to confuse and mislead. The defendant had no assignment of the Pike lease, and did not stand in his shoes; he simply arranged with Pike to enter into possession according to his verbal agreement with the plaintiff preparatory to the contemplated lease. Pike consenting, they thus occupied together, but when Pike's lease expired, he quit the premises and thus terminated his lease. The defendant, therefore, could not be holding over under that lease. The consent which the plaintiff gave the defendant to occupy was nugatory, unless Pike con-

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sented during his lease; but such consent was good until it was withdrawn, and attached when Pike's lease expired, and inured to the benefit of the defendant until his occupancy was lawfully terminated. For the defendant to have sustained the relation to the plaintiff as Pike holding over, he would have to have been the assignee of the Pike lease. If, therefore, he entered without the consent of the plaintiff, but simply went into possession with the assent of Pike, when the Pike lease terminated, and Pike vacated the premises, the defendant was not in lawful possession, or holding over under Pike's lease. But whether Pike would be entitled to ten or ninety days' notice to quit, as a tenant holding over after the expiration of his lease, would depend on the fact whether the leasing was for the purpose of farming or agriculture; and as the defendant did not succeed by assignment to the Pike lease, but his rights depend on the consent of the plaintiff to make out the relation claimed to exist, his right in no way depended upon, nor can be measured by that lease. We think this instruction was error. The next exception is in refusing to give this instruction: "If the jury find that the defendant occupied the premises in question for agricultural or farming purposes, then said defendant would be entitled to ninety days' notice to quit the premises before the action of forcible entry and detainer could be brought." And in lieu thereof, instructing the jury that "if they find from the evidence that the defendant and William Neppach made an oral agreement that said Neppach would make a lease in writing, devising the premises in controversy to the defendant for five years, at a rent of one hundred and fifty dollars a year in advance, and in pursuance of that agreement and with the consent of said William Neppach, the defendant entered into the possession of the premises, such possession was lawful until defendant's right to possession should be terminated in a lawful manner; and in that case William Neppach, though not bound to make a five years' lease, could not terminate the lawful occupation of the defendant so created without a notice to quit of ninety days; and if the jury find the facts as stated in this instruction, and further find that only ten days' notice to quit was given the defendant, then the verdict

Points decided.

should be not guilty." Upon the assumption that the contemplated lease was for the purposes of agriculture as alleged, and the evidence tended to prove, this instruction is not only correct, but as favorable to the defendant as he could have asked. Nor is it understood that any particular complaint is made directly against it, but that it was not sufficient to include the instruction asked, or to take its place. The error in the instruction asked lies in assuming that the possession of the defendant as against the plaintiff was with his consent. That was a fact to be found before the jury could proceed to the consideration of the matter suggested in the transaction. The consent of the plaintiff was essential to create the tenancy, and when that is the fact in dispute, as here, the question whether the relation of landlord and tenant exists is for the jury. (*Chamberlin v. Donahue*, 44 Vt. 37; *Rigg v. Bell*, 5 Term Rep. 471.) But for the reasons already suggested in the second instruction given and excepted to, the judgment must be reversed and a new trial ordered.

[Filed June 25, 1887.]

ROBERT C. FORD, RESPONDENT, v. UMATILLA
COUNTY, APPELLANT.

COUNTY—ACTION AGAINST.—An instruction that before a recovery could be had against a county for an accident occasioned by the falling of an unsound bridge the jury must find that the bridge was a county structure, or knowingly recognized as such by the proper officials of the county, and that before a recovery could be had, that the proper authorities had been notified for a reasonable time before the accident of the defective condition of the bridge, or that the bridge had been so openly and notoriously unsafe as to convey notice of its defective condition for a reasonable time, by reasonable time being meant such time as by the exercise of proper diligence would have allowed its repair, and that if the accident was the result of internal decay not perceptible, the defendant is not liable unless actual notice had been given to the proper officials; *held*, to be as favorable to defendant as it could claim.

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—The plaintiff must establish that he was injured by the negligence of defendant by testimony that does not tend to show contributory negligence upon his part; but beyond this, the burden of proof to establish contributory negligence is upon the defendant.

SAME.—Slight negligence not contributing to the injury does not defeat the plaintiff's right to recover.

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Argument for Respondent.

BURDEN OF PROOF—INTOXICATION. — It does not change the burden of proof to the plaintiff if shown at the time of the accident he was intoxicated.

SAME. — It is not contributory negligence on the part of a traveler to assume that a bridge left open for travel is safe.

DAMAGES, MEASURE OF—WHAT IS. — An instruction "that the measure of damages in this case, if you find for the plaintiff, is the value of the horses killed, and a sum equal to the amount of damage which the evidence shows to have immediately resulted to plaintiff's other property from the accident, and any expenses necessarily incurred by him, as the natural and immediate result of the accident," held, to be substantially correct.

JUROR'S CHALLENGE. — In an action against a county to recover damages, it is sufficient ground of challenge for implied bias that the juror called is a tax-payer.

SAME. — Where a party challenges a juror for implied bias, and his challenge is wrongfully overruled, the error so far as the particular juror is concerned is waived by a subsequent peremptory challenge to him.

SAME. — There is no statute allowing questions to be asked of a juror as to prejudice existing in his mind, for or against either party to the action.

SAME. — It is proper in such case to submit a challenge for actual bias, and if accepted to by the opposing party and overruled by the court, the decision could be reviewed on appeal.

APPEAL from Umatilla County. Affirmed.

Cox & Minor, and Cox, Smith & Teal, for Appellant.

When it appeared that plaintiff was intoxicated, the burden is on him to show that he did not contribute to his injury. (*Cramer v. City of Burlington*, 42 Iowa, 315; *Burns v. Town of Elba*, 32 Wis. 605; *Shearman & Redfield on Negligence*, § 45.)

If a witness has testified falsely, his testimony should be totally disregarded. (*State v. Lee Hale*, 12 Or. 352.)

Bailey, Ballery & Turner, for Respondent.

Every tax-payer of a municipal corporation is subject to a challenge in an action against the municipality of which he is a member. (Code, subd. 4, § 184, p. 143; *Commonw. v. McLane*, 70 Mass. 427; *Hawes v. Gustin*, 84 Mass. 403; *Russell v. Hamilton*, 2 Scam. 57; *Wood v. Stoddard*, 2 Johns. 195; *Garrison v. City of Portland*, 2 Or. 123; *Proffatt on Jury Trials*, § 169.)

But defendant is not entitled to a challenge on this ground. (*People v. Maher*, 4 Mead, 247.)

Is the sustaining or overruling a challenge for actual bias

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subject to a review? (*State v. Brown*, 7 Or. 199; *Trenor v. C. P. R. R.* 50 Cal. 222; 2 Abb. N. Y. App. 215.)

It is immaterial whether or not a bridge is exactly on the line of a county road, if it is adopted and recognized by the county in connection with the highway. (*McCalla v. Multnomah Co.* 3 Or. 424; *Rankin v. Buckman*, 9 Or. 260.)

It is the duty of a county to keep bridges and highways in good repair. (Code, § 71, p. 737; Code, § 870, p. 283; *Rankin v. Buckman*, 9 Or. 263; *McCalla v. Multnomah Co.* 3 Or. 424.)

Notice of unsafe condition may be inferred. (*Heilner v. Un. Co.* 3 Or. 83; *McCalla v. Multnomah County*, *supra.*)

Drunkennes is not evidence of negligence. (*Davis v. O. C. R. R. Co.* 8 Or. 175.)

Negligence on the part of the plaintiff is a matter of defense, and the burden of proof to establish the same is upon the defendant. (*Walsh v. O. R. & N. Co.* 10 Or. 251; *Grant v. Baker*, 12 Or. 330; *Pa. Canal Co. v. Bentley*, 66 Pa. St. 66; *Cleveland & C. R. Co. v. Rowan*, 66 Pa. St. 393; *Hill v. New Haven*, 37 Vt. 501.)

Slight negligence which does not contribute to the accident is not a bar to recovery. (*Holstein v. O. C. R. R. Co.* 8 Or. 163; *Dice v. W. T. & L. Co.* 8 Or. 60; *Bequette v. P. T. Co.* 2 Or. 200; *Wasner v. D. L. & W. R. R. Co.* 80 N. Y. 213.)

THAYER, J.—The respondent commenced an action in said Circuit Court against the appellant to recover damages for injury to certain personal property. He alleged in his complaint that on the 13th day of October, 1884, he was traveling through said county, transporting a quantity of household goods, and stock, cattle, and horses, and that while his team of four horses and a wagon, with a load of household goods, merchandise, and library, were being driven over and across the county bridge, over Butter Creek, in said county, at the "Ewing place," and the respondent was unaware of the bridge being defective or unsafe, and without fault or negligence on his part, it broke and fell, precipitating the team of horses and wagon, and load of goods, merchandise, and library, into said creek; that two of

the horses of the team were killed thereby, and the other two horses, the wagon, household goods, merchandise, and library were badly damaged; that said bridge was at said time a county bridge of said county, and was, and for a long time prior thereto had been, in an unsafe and insecure condition, and without proper protection or notice to citizens or travelers against accident. The respondent claimed general damages in the sum of seven hundred and seventy dollars, and one hundred dollars as special damages, on account of expenses incurred in consequence of the injury. The appellant denied in its answer that the bridge was a county bridge of said county; denied that respondent's team was lawfully passing over the same at the time of the occurrence, or that the respondent was unaware that the bridge was defective or unsafe, or was without fault or negligence, or that the horses were killed, and other property damaged by reason of the accident alleged in the complaint; denied any knowledge or information sufficient to form a belief as to the unsafe and insecure condition of the bridge at the time of the accident, or that it was without proper protection and notice to citizens and travelers against accident; and denied all the other material allegations of the complaint. The appellant also alleged in its answer that the bridge in question was a private bridge, erected by one H. D. Barton across Butter Creek some rods south of the county road crossing said creek; that said county road crossed the creek at a ford; and that at the time of the accident the creek was nearly dry and easily fordable; that the county road, at and near the ford, was a plain traveled road; that the respondent left it without cause or reason; that before his team was driven onto the bridge he was warned that it was unsafe; but that he was intoxicated at the time, and recklessly caused and directed the team to be driven upon it; that the defect in the bridge was the internal decay of the stringers, which was a latent defect. The new matter in the answer was controverted in a reply filed on the part of the respondent, and the case, thereupon, was at issue for trial.

The respondent's counsel filed a motion for a change of the place of trial, upon the grounds that the inhabitants of the

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county were so prejudiced against the respondent that he could not expect to obtain an impartial trial of the cause. The appellant opposed the motion, and the court overruled it. Subsequently, the appellant's counsel filed a similar motion, upon the grounds that the judge of the court was so prejudiced against the appellant that it could not expect an impartial trial, which the respondent opposed, and the court also overruled; thereafter the case came on for trial before a jury. In impaneling the jury, the respondent's counsel claimed the right to challenge those they saw fit who were tax-payers in the county, on the grounds of implied bias. Accordingly, a number who were called as jurors were challenged upon said grounds, and the court sustained the challenges, to which the appellant's counsel saved exceptions. After the court had made such ruling the appellant's counsel interposed a challenge to one T. B. Morgan, who was called as a juror, upon the same grounds. The respondent's counsel resisted the challenge, and the court overruled it, to which the appellant's counsel excepted, and then challenged the juror peremptorily. Another juror called (R. Sargeant) was asked by the appellant's counsel if there was any prejudice or ill-feeling then existing in his mind against the present County Court of Umatilla County; also, if there was any such prejudice or ill-feeling growing out of the transaction in question; which several questions were objected to by the respondent's counsel, and the objections severally sustained by the court, and exceptions duly taken to the rulings. After the impaneling of the jury was completed, the parties proceeded to introduce their evidence on both sides, a number of objections were made and exceptions taken to the rulings of the court thereon. We have examined the various exceptions so taken and are of the opinion that no error was committed in respect thereto affecting the substantial rights of the appellant. The testimony being closed, the court gave a number of instructions to the jury, to which exceptions were taken upon the part of the appellant; also, a number of exceptions were taken by the appellant's counsel to the refusal upon the part of the court to give certain instructions as asked by said counsel. The instructions asked; and those given that

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bore upon the merits of the case, are the following: The appellant's counsel asked the court to instruct the jury that, "before any recovery could be had in the action they must find that the bridge in question was either a public bridge of Umatilla County in fact, or was knowingly recognized as a county structure by the proper officials of said county at the time of the accident." This instruction the court gave as asked, except that the court omitted the words "at the time of the accident," and also left out the word "any" between the words "before" and "recovery." The court also instructed the jury as follows: "If you find that the bridge in question was of the character described in the foregoing instruction, before any recovery could be had in this action, you must find that the proper authorities of the county had been notified for a reasonable time prior to the accident of the defective condition of the bridge, or that it had been openly and notoriously unsafe to such an extent as to convey notice of its defective condition for a reasonable time prior to the accident. By a reasonable time is meant such time as, by the exercise of diligence, would have allowed of its repair or the prevention of public use. If you find that the breach in the bridge was the result of an internal decay of its supports, not perceptible to the observation, the defendant is not liable for damages resulting from such breach, unless actual notice of the unsound condition of such supports had been given to the proper officers of the county for a reasonable time before the occurrence of the accident." These instructions were certainly as fair as the appellant had a right to claim. We have always doubted the soundness of the rule which allowed a recovery against a county for such an injury, and have never been able to discover any such relation between a county and its officers as that of master and servant, or principal and agent, nor how the doctrine of *respondet superior* could be made applicable; but it was established in this State, and we had to follow it until the legislature saw proper to change it, which it seems to have done at the last session thereof. (Session Law of 1887, p. 45.) The act, however, does not affect the judgment herein. The appellant's counsel also asked the court to instruct the jury that before any

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recovery could be had, the plaintiff must have submitted to them a case clear of contributory negligence on his part; that the injury must have resulted exclusively from the negligence of the defendant, before it could be called upon to respond in damages therefor. This proposition would seem to imply that the plaintiff was required to establish that he was not guilty of negligence in the affair, which is not the rule. He was obliged to show that the injury was received in consequence of the defendant's negligence, and would not then be entitled to recover if his proof showed that he was also guilty of negligence, which contributed to the injury. In other words, he had to prove that the defendant's negligence occasioned the injury by evidence that did not implicate himself as being guilty of negligence in the affair, contributing to the result. It is immaterial whether a plaintiff in such a case is, as a matter of fact, guilty of negligence or not, unless the evidence upon one side or the other shows it. If it does not appear from the evidence adduced by the plaintiff, then the defendant must establish it. It primarily belongs to the defendant to prove it as a defense, though he may avail himself of the benefit of evidence tending to prove it, appearing from the plaintiff's own showing. The court had already, in effect, instructed the jury that the respondent was bound to exercise such care as a man of ordinary prudence would use, ordinarily, while driving along a public highway or over a county bridge; that is clearly inferable from the twelfth instruction given to the jury, and this we think is all that could reasonably have been asked. The court had also told the jury that slight negligence on the part of the plaintiff, which did not contribute to the injury, was no objection to his right to recover. This was in accordance with the decision of this court in *Bequette v. People's Transportation Company*, 2 Or. 200, and we see no reason to question its correctness. The appellant's counsel also requested the court to instruct the jury that if they found that the plaintiff was intoxicated at the time and place of the accident, the burden of the proof was upon him to show that he exercised due care, and if his intoxication contributed to the accident, he could not recover. The court had already instructed

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the jury that the fact as to whether plaintiff was drunk or not could only be considered by them in relation to the question as to whether or not he was negligent; that drunkenness was not a defense by way of contributory negligence, unless it was the approximate cause of the injury complained of; and we suppose the court concluded that it had given upon that subject all the instruction necessary—at any rate, the judge refused to give the instruction asked. We can hardly imagine the ground upon which the instruction asked should have been given. Whether the respondent was drunk or sober, he had the right to suppose that a bridge open to the use of the public, and under control of the county officials, would bear up his load in crossing it. Possibly his judgment as to its strength might have been better while sober than while drunk; but the appellant can claim nothing upon that ground. The county, by leaving the bridge open to public travel, said, in effect, that it was secure, and because the respondent might be inclined to be more credulous when intoxicated than when sober, it was no fact that would excuse the appellant. We are unable to discover where or how the question of negligence could have arisen. The traveling public are not required to be bridge inspectors in order to entitle them to recover for such neglect, and their attempting to cross such a structure, circumstanced as this one seems to have been, under an assumption that it was safe, could not be charged as contributory negligence, whatever might be their condition as to intoxication or sobriety. There is no pretense that respondent drove his team carelessly or recklessly, or did any act which contributed to the injury except in attempting to cross the bridge, and the appellant, in the manner before suggested, invited him to do that. If the burden of proof is to be shifted in such a case in consequence of the intoxication of the plaintiff, it must be upon the ground that a drunken man is presumed to be careless in what he does; and that, therefore, proof of his being drunk authorizes the inference that he is guilty of negligence. The law will not excuse a person who has committed a wrong because he was intoxicated at the time; but that it will presume him guilty from that fact, cannot in our opinion be maintained.

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If the respondent was intoxicated at the time of the occurrence, it was a circumstance tending to corroborate proof of carelessness; but, standing alone, it was not such proof. The appellant had, in order to make out its defense, to prove that the respondent was careless, whether drunk or sober, unless, as before suggested, such proof appeared from his own showing.

The appellant's counsel further requested the court to instruct the jury that if they found, either that the plaintiff was warned of the fact that the bridge was unsafe before the team that was injured was driven upon it, and being so warned, directed and ordered the teams to be driven upon it, or that Sherman Ford, the driver of the team which was injured, knew that the bridge was unsafe before he drove upon it, whether he communicated such knowledge to the plaintiff or not, and at the same time that the bridge might readily have been avoided, they must, in either of such cases, return a verdict for the defendant, which instruction the court refused. Upon what ground the instruction was refused does not appear. The evidence in the bill of exceptions, tending to explain the exception to the refusal of the court to give the instruction, consists, as we understand, of the testimony of Mr. Pennington as to what the said Sherman Ford told him regarding the accident, and circumstances under which it occurred. Sherman Ford was examined concerning the matter as a witness in the case, and denied emphatically that he warned his father, the respondent, as to the bridge being unsafe, or of the latter's directing or ordering him to drive upon it, or that he knew that the bridge was unsafe at the time he drove the team that was injured upon it. Mr. Pennington, however, testified that said Sherman told him, at the time referred to, an entirely different story, but still, did that establish the fact, or have any other effect than to impeach Sherman Ford? If the conclusion indicated is correct, and we think it must be, there was no testimony in the case entitling the appellant to ask for said instruction.

The instruction given by the court in regard to the measure of damages, we think was substantially correct. The question on that point merely involved the loss sustained by the respondent as the direct and proximate cause of the appellant's neglect.

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The injury was to a kind of personal property that the jury were competent to estimate, almost without proof. The value of the property affected was easily ascertained, and we cannot see but that the assessment of damages was entirely fair and just. Such questions are so much within the province of a jury to determine, that this court will not reverse a judgment in such a case, unless a rule of evidence has been clearly violated, and an injustice been done the party in consequence. The case having been submitted to the jury, they made answer under direction of the court that the bridge in question was a county bridge in fact; that it was knowingly recognized as such by the proper officials of the county; that it was defective and dangerous, and that the county officials had notice of its condition prior to the happening of the accident; that the plaintiff was not intoxicated at the time and place of the accident, and that Sherman Ford did not have notice of the unsafe condition of the bridge before he drove his team upon it, and thereupon returned a general verdict in favor of the respondent for the sum of seven hundred dollars, upon which the judgment appealed from was entered. Upon the questions raised by the appellant's counsel while the jury were being impaneled, the court is of the opinion that in an action against a county to recover damages, it is a sufficient ground of challenge for implied bias under the laws of this State, that the juror called to try such action is a tax-payer in such county, and that such challenge may be taken by either party to the action; that the Circuit Court in this case properly sustained the challenge taken by respondent's counsel upon such ground, and should have sustained the challenge taken by the appellant's counsel upon that ground; but we are of the opinion that the latter, having afterwards challenged the juror peremptorily, thereby waived his challenge for cause. By adopting that course he avoided the effect of the rulings. The questions put by the appellant's counsel to the juror R. Sargeant, as to whether there was any prejudice existing in his mind against the County Court of Umatilla County, and whether there was any such prejudice or ill-feeling growing out of the transaction then before the court, were proper questions under a practice that has been permitted

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in trial courts in the State, though we are not aware of its being authorized by statute. Questions of that character are asked in order to ascertain whether or not any grounds of challenge exist. But being a mere question of practice that has been permitted by sufferance of the trial courts, this court will not undertake to enforce it. The appellant's remedy, where the court refused to allow the said questions to be asked the juror, was to have submitted a challenge to the juror for actual bias, and specified the grounds upon which it was taken. Then, if the respondent's counsel had excepted to the challenge, and the Circuit Court determined that it was insufficient, the decision thereon could have been reviewed by this court. Title 2 of chapter 2 of the Civil Code prescribes the mode of procedure in such cases, but as the matter now stands, this court cannot consider it.

It follows from the views herein expressed that the judgment appealed from must be affirmed, and it is so ordered.

Petition for a rehearing.

THAYER, J. — This court held, in this case, that in a trial of a civil action against a county for damages to an individual occasioned by an alleged neglect upon the part of the county, a tax-payer of the county was not qualified to sit as a juror, and indicated the opinion that either party to the action had the right to challenge a juror for cause upon that ground, but that where the challenge was interposed upon the part of the county, and overruled by the trial court, and the juror was afterwards challenged peremptorily upon the part of the county, it would be a waiver of the first challenge.

The counsel for the appellant have filed a petition for a rehearing, and in support thereof have cited a number of authorities, in which it has been held that a peremptory challenge made after a challenge for cause had been overruled by the trial court was not such waiver, where it was shown by the record that the party had exhausted his peremptory challenges before the panel was completed; which fact, they claim, is shown by the record in this case. We have inspected the record, and find that, upon the trial of the cause in the court below, the respond-

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ent challenged several jurors for implied bias, because they were tax-payers of the county. In each instance the court sustained the challenges, and excluded the jurors challenged from the panel. The appellant's counsel then severally challenged three jurors for like cause, but the court refused to sustain these challenges, to which ruling an exception was taken; and said counsel then challenged each of said jurors peremptorily. These three challenges exhausted the appellant's peremptory challenges before the jury was completed, but no further objection seems to have been made in filling the panel. Since the petition for a rehearing, we have made a further examination of the question, as to the effect of overruling a challenge for bias, where the party interposing it has subsequently challenged the juror peremptorily. The general rule upon the subject seems to be, that if the trial court erroneously refuses to allow a challenge, and the party making it then excludes the juror by a peremptory challenge, the error of the court is waived if a jury is obtained before the party against whom the error is committed has exhausted his peremptory challenges; otherwise the error is deemed material. (*People v. Weil*, 40 Cal. 268; *Hubbard v. Rutledge*, 57 Miss. 7; *Hartnett v. State*, 42 Ohio St. 568; *State v. Brown*, 15 Kan. 400; *Iverson v. State*, 52 Ala. 170; *Bejarano v. State*, 6 Tex. App. 265; *Robinson v. Randall*, 82 Ill. 521; *Burt v. Panjaud*, 99 U. S. 180; *Benton v. State*, 30 Ark. 328; *State of Nevada v. Raymond*, 11 Nev. 98.) In the latter case, a further qualification of the rule as to the error becoming material is made, and is to the effect that an injury could only arise where the challenging party was compelled to exhaust all his peremptory challenges, and afterwards was compelled to have an objectionable juror placed on the panel for want of another challenge; and they all proceed upon the theory that the party will be presumed to have been injured by the ruling where he has been forced to exhaust all his peremptory challenges. And in all of them I believe the challenge for cause was on account of bias against the party interposing it, and the peremptory challenge was resorted to in order to exclude a juror in consequence of such bias; that the party had no alter-

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native but to permit a juror, evidently prejudiced against him, and disqualified in consequence of such prejudice, to sit in the case, or to use one of the peremptory challenges to get rid of him. It may be well doubted whether the fact that the party challenging in such case exhausted all his peremptory challenges before the panel was filled, is sufficient of itself to authorize the inference that he has been injured in consequence of the erroneous ruling. The subsequent jurors in the case may have all been acceptable to him, and if he had had more peremptory challenges, would not have desired to use them.

The further test of the error having been prejudicial to him, required in the Nevada case, referred to above, seems to be reasonable. The court there held, that if a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily. There does not necessarily arise any inference that the challenging party is thereby injured; and that is in harmony with all the other decisions cited. When, then, will it be inferred that he has been injured? Will it be when he has made all his peremptory challenges, or when he has been compelled to accept of an obnoxious juror in consequence of his having been compelled to exhaust them? The record in this case fails to show the existence of the latter alternative, or that any of the jurors were tax-payers of the county.

There is another feature in this case that, to my mind, has an important bearing. The ground of the appellant's challenge for cause was for a particular disqualification of the juror. It was not because he was prejudiced or biased against the appellant, but because he had an interest in the event of the action, which, under the wording of the statute, rendered him incompetent to sit. That interest, however, was of such a character as to incline the juror to favor the appellant, and the challenge for cause, therefore, was necessarily technical. The appellant was not compelled to resort to a peremptory challenge in order to exclude the juror for grounds for which he had been challenged for cause. There must have been an entire different reason from that for excluding him. His being a tax-payer of the county interested him in deciding in its favor, and the appel-

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lant's counsel certainly must have had other reasons for objecting to his sitting. I have grave doubts as to whether the refusal to sustain such challenge for cause as the one under consideration would, in any event, be such an error as would justify the reversal of a judgment. It would be difficult to determine how the party in such a case could be injured by the error. It seems to me, at least, that where a challenge to a juror is made by a party for cause, which under no circumstances could be prejudicial to the party, and the challenge is interposed as a mere technical right under the statute, that the party must stand upon his strict right, and that if he take a subsequent step in the proceedings, and objects to the juror, evidently for other reasons, he should be deemed to have waived his right to insist upon the former objection. I attach very little importance to the claim that the appellant was compelled to exhaust all his peremptory challenges under any view of this case.

The challenges for cause, under the circumstances, were sought to be used as a kind of expedient—were employed as a sort of substitute for peremptory challenges, when the latter in strictness were the appropriate ones to be employed. The appellant's counsel will not candidly claim that they desired any of the jurors that were drawn to be excluded simply because they were tax-payers of the county of Umatilla. If the grounds of the challenge for cause had been of such a nature as would have been likely to prejudice the juror against the appellant, and the latter had been put to its peremptory challenge in order to exclude him, there would be more reason for claiming that the error was prejudicial. But under the circumstances, as they exist, no such presumption can be drawn.

The petition for a rehearing will therefore be denied.

OCTOBER TERM, 1887.

CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF
OREGON.
OCTOBER TERM, 1887.

[Filed October 17, 1887.]

JORDAN, RESPONDENT, v. LA VINE ET AL., AP-
PELLANTS.

UNDERTAKING—LIABILITY OF SURETIES FOR COSTS.—A surety in an undertaking, "for the payment of such sum as may from any cause be adjudged against the plaintiff" is liable for the costs of the action. (Following *Carlton v. Dixon*, 14 Or. 294.)

APPEAL from Multnomah County. Affirmed.

W. T. Burney, for Respondent.

D. R. Murphy, for Appellants.

LORD, C. J.—This appeal is brought from a judgment against the defendants on their demurrer to the plaintiff's complaint. The action was on an undertaking for the recovery of personal property of the defendant La Vine, and his sureties as co-defendants. The question of law raised on the facts is identical in principle with that decided in *Carlton v. Dixon*, 14 Or. 294. It was held in that case, upon a condition in an undertaking as

Opinion of the Court—Strahan, J.

here, "for the payment of such sum as may, from any cause, be adjudged against the plaintiff," upon a judgment adverse to the plaintiff, that the sureties in the undertaking are liable for the costs. (See *Tibbs v. O'Conner*, 28 Barb. 538.) In the original action the defendant La Vine was plaintiff. As the case cited was inadvertently overlooked by counsel, and as nothing has been suggested to impeach the correctness of that determination, it must govern in the decision of this case, and consequently, the judgment is affirmed.

[Filed October 17, 1887.]

W. W. SWEENEY, RESPONDENT, v. L. J. McLEOD
ET AL., APPELLANTS.

CONTRACT—LOBBY SERVICES—PUBLIC POLICY.—A contract whereby one undertakes to perform "lobby services" for another for a consideration is against public policy and void.

SECTION 638 OF THE CRIMINAL CODE—EFFECT OF.—The sole purpose and effect of this section was to make lobbying under the circumstances therein described *criminal*, and not to render lobbying under any conditions so far lawful that the courts would enforce contracts for such services.

APPEAL from Multnomah County. **Reversed.**

Zera Snow, for Appellants.

H. T. Bingham, for Respondent.

STRAHAN, J.—The material portions of the complaint in this action are as follows: That on the twelfth day of December, 1886, the defendants employed plaintiff as their agent, to procure evidence to be submitted to the legislature of the State of Oregon, which was soon thereafter to convene, or to such committee of said legislature as might be appointed to investigate the subject, that the method of taking salmon fish by means of fish-wheels at the fishery of the defendants at Celilo, Oregon, was not detrimental to the salmon fishing interests of the State, and was not more destructive of fish than other methods of capture. And they employed plaintiff to attend said session of the

legislature, and by means of all *legitimate importunity* and submission of evidence, to prevent the passage of any law prohibiting the taking of salmon by fish-wheels. And, as a consideration for such services, to be done and performed by the plaintiff for the defendants as aforesaid, defendants agreed and promised to pay the plaintiff as much as his said services were reasonably worth, and to pay him for all moneys he should pay out in the doing of said services for which he was employed by the defendants, as aforesaid, and also agreed to pay him his outlay in expenses in attending the said session of the legislature. That in pursuance of said hiring and agreement, plaintiff did procure such evidence, and did submit the same to the several committees appointed by the legislature for the investigation of fish-wheels for the taking of salmon fish by the defendants and others, *and by his efforts induced favorable reports by the said committees* allowing the use of fish-wheels, but providing for open days in each week when the wheels should not be used for the taking of fish; *and finally succeeded in preventing any legislation prohibiting the use of fish-wheels* for the taking of salmon fish. The amended complaint then alleges various sums of money paid out by plaintiff as "expenses necessarily incurred," amongst which are one hundred dollars paid Henry Johnson, and fifteen dollars for three boxes of cigars used in the entertainment of members of the legislature while in the employment of defendants as aforesaid.

The defendants' answer denies the material allegations of the complaint, and then alleges, by way of separate defense, that about the 12th of December, 1886, the defendants engaged the plaintiff to attend the session of the legislature of the State of Oregon, thereafter shortly to convene, and to appear before said legislature and said committees of said body as might have the subject in charge, then and there to make any argument and showing that the taking of fish by means of fish-wheels was not injurious to the fishing interests of the State; that at the time of such employment, plaintiff had been engaged by other persons interested in and engaged in the business of fishing by means of fish-wheels, for a similar service in their behalf by the plaintiff; in consideration whereof the plaintiff agreed to accept and receive

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from the defendants the sum of ninety dollars in full satisfaction and settlement for all service rendered under the engagement and employment by the defendants, as aforesaid, and of all expenses incurred in the course of the same, which sum was then and there, at the time of such engagement and shortly thereafter, and prior to the commencement of this action, paid to plaintiff by the defendants, and the plaintiff agreed to perform no service and incur no expense other than such as by the said sum of ninety dollars would be thereby paid for, and that this is the same service mentioned in complaint and none other. A further defense alleges that at and during all the time mentioned, while the plaintiff was performing such service, he was also secretly in the employment of other persons representing the same interests, and received divers sums of money therefor and kept the same concealed from the members of the legislature; but on the contrary, the plaintiff gave it out and caused it to be understood among members of the legislature that he was not so employed by any persons interested in the taking of fish by means of fish-wheels, and had no pecuniary interest therein, but was acting wholly in the public interests, biased by no private interest or employment, intending then and there and thereby to exercise a greater influence with said members of the legislature and of said committees, and intending then and thereby and by the secrecy and deception aforesaid to corrupt the judgment and understanding of the said legislature, and of the members thereof.

Another defense alleges that for ninety dollars the defendants employed the plaintiff to appear before the legislature, then about to convene, and make an *argument*, and by means thereof a showing before such legislature and such committees thereof as might have the subject in charge, that the taking of salmon by means of fish-wheels was not injurious to the fishing interests of the State, and not more injurious than the taking of fish by other means. That plaintiff failed to appear before the legislature, or any committee thereof, or to make any *argument*, but instead thereof did then and there act wholly as a "lobby member" in the interests of the taking of fish by means of fish-wheels, and then and there in the lobby chambers and corridors of said

legislative hall, and on the street, and at the hotels and boarding-houses in the town of Salem, when said legislature convened, personally importuned divers and sundry members of said legislature and of its committees in the interests of the taking of fish by means of fish-wheels, and did then and there, as such "lobby member," at the places aforesaid, seek to use his personal influence with the members of said legislature and of said committees, with many of whom the plaintiff was personally acquainted, in the interest of fishing by means of fish-wheels; and did expend of the money so paid plaintiff as aforesaid, large sums of money in liquors, cigars, and dinners, in entertaining said members of said legislature and of said committees, etc.; and concealed from said members and committees the fact of plaintiff's said employment. The new matter in the answer is all denied by the reply. The trial resulted in a verdict and judgment for the plaintiff in the sum of two hundred and eighty-one dollars, from which judgment an appeal is brought to this court.

On the trial in the court below, the evidence on the part of the plaintiff tended to show that about the 8th of December, 1886, it was arranged between plaintiff and defendants that plaintiff should immediately enter the service of the defendants as a *detective* and agent, to keep them advised and informed as to what was going on with respect to rumored hostile action against fishing by fish-wheels by various persons interested adversely to the defendants, and that such service was to continue during the session of the legislature; and that for such service the plaintiff was to receive a reasonable sum, and be re-imbursed all his expenses incurred and paid out by him in the service; that he incurred the expenses set out in the amended complaint, and that his services were reasonably worth two hundred dollars per month. On the part of the defendants, the evidence tended to prove that in December the defendant McLeod heard that plaintiff was engaged to represent the fish-wheel men at the coming session of the legislature, where it was supposed measures antagonistic to fish-wheels were to be pressed, and he wrote to plaintiff inquiring of him what was going to be done, and what it would cost

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to let "us" (defendants) into the fight. The plaintiff then came to Celilo, and he came a number of times afterward without defendant's solicitation. He wanted money, and talked about his going to Salem when the legislature convened. He said he knew many of the members and had a personal influence with them, and that he could do a great deal to prevent hostile legislation; that he had experience in that class of work, and if necessary, could steal any bill that might be passed; that he had done that in Washington Territory; that he must have money to go on. Witness McLeod told him he could make no contract with him till Mr. Taffe returned from the East; but plaintiff persisted in wanting money, and said he was on his way to Alkali to see some of the members of the legislature whom he knew, and with whom he had personal influence. The defendant then gave him twenty dollars, but did not direct him what to do with it, nor did he say what he would do with it. Subsequently plaintiff again came to Celilo without solicitation and wanted money to go to Salem. Defendant McLeod told him he could make no contract with him because Mr. Taffe was still East. He persisted in wanting money, and defendant McLeod finally gave him seventy dollars more to get rid of him, and told him to work as far as that would go, and when his money gave out he was to stop. Never told him what he was to do for it, nor did plaintiff tell defendant what he would do with it. Never engaged plaintiff to perform any service, nor agreed to re-imburse him in his expenses at Salem or elsewhere, nor agreed that McLeod & Co. should pay him for any service or any expense. Never authorized the incurring or paying any of the items charged in the amended complaint. That in January, 1887, after Mr. Taffe's return from the East, defendants were on their way from the Dalles to Celilo, and found plaintiff on the train. He again wanted money. Mr. Taffe and he were talking about what could be done if a bill were passed; to which plaintiff replied: "Well, I could steal the bill. The clerk of the Senate was elected by me and owes his position to me, and I'd steal the bill."

The evidence of J. H. Taffe, one of the defendants, tended to

prove that he and McLeod saw plaintiff on the train at the Dalles about the 26th of January, 1887. That witness then asked plaintiff what he could do if a bill should be passed injurious to the fish-wheel men. He said he could steal the bill. Witness asked him how. He answered: "Well, I can't exactly tell you how, but the clerk of the Senate owes his position to me, and I could steal it, through him."

At the conclusion of the evidence the defendants' counsel asked the court, among other things, to charge the jury as follows: "That if the contract between the plaintiff and defendant was that plaintiff should attend the session of the legislature, and there to lobby with the members thereof against a bill there pending, antagonistic to the taking of salmon fish by fish-wheels, and by lobby services prevent the passage of such a law, he could not recover thereon."

Defendants' counsel further asked the court to instruct the jury as follows: "That if it was the understanding between the plaintiff and defendants that plaintiff should attend at the session of the legislature, and there privately importune, converse with, and persuade members of the legislature in the interests of the defendants, against any measures pending before the legislature antagonistic to the taking of salmon fish by means of fish-wheels, he cannot recover." Defendants' counsel further asked the court to instruct the jury as follows: "That if it was the understanding between plaintiff and defendants that the plaintiff should attend the session of the legislature, and by exercising, and seeking to exercise, his personal influence with members of the legislature in the interests of the defendants, and by means of such influence, and by then lobbying for the defendants, prevent or aid in preventing any legislation forbidding the taking of salmon fish by means of fish-wheels, he could not recover, nor could he recover for any expenses incurred while engaged in such service."

These instructions, with others asked by the defendants, embracing, in substance, the same legal propositions, were refused by the court, to which an exception was taken. The court, then, of its own motion, gave the jury the following

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instruction: "By section 638 of the Criminal Code, it is made a misdemeanor for any person, being an agent of another interested in the passage or defeat of any measure before the legislature, in relation to such measure to converse with and explain, or in any manner attempt to influence any member of the legislature in relation to such measure without first truly and completely disclosing to such member the interest of the person whom he thus represents; and if it was the contract between the plaintiff and defendants that the plaintiff should perform his service without disclosing truly and completely the interests of the defendants, he cannot recover; but on the other hand, the plaintiff had the right to contract with the defendants that the plaintiff should go to the legislature, and after truly and completely disclosing the interests of the defendants, oppose and prevent the passage of any law antagonistic to the defendants' interests by public discussion, argument, or submission of evidence, or by privately and not openly conversing with and importuning individual members, and of its committees in defendants' interests, and by exercising and seeking to exercise a personal influence with them in the defendants' interests; provided, that all the while such member or members had been truly and completely informed by the plaintiff of the interests in behalf of which plaintiff was working, and of his own interest therein; and the plaintiff can recover for such services, if he was retained to perform the same, and for all expenses alleged in the complaint, if they were incurred and paid out by him, if the plaintiff (defendants) promised to re-imburse his expenses, except that the plaintiff cannot recover for the items of fifteen dollars alleged to have been expended for cigars in entertaining members of the legislature while he was engaged in such service."

The first question demanding our attention is the refusal of the court to give the instructions asked by appellant. These instructions all, in effect, assert the same principle, though somewhat varied in form, and we think they contain a correct statement of the law applicable to the particular facts before the jury, and that it was error to refuse them. It is against public policy for any person to hire himself out to perform lobby services for

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another, and all contracts made or other acts done in furtherance of such purpose are illegal, and furnish no cause of action whatever for or against any one. In *Powers v. Skinner*, 34 Vt. 274, the principle is thus stated: "It has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services of a lobby agent, or for the sale by an individual of his personal influence and solicitations to procure the passage of a public or private law by the legislature, is void, as being prejudicial to sound legislation, manifestly injurious to the interests of the State, and in express and unquestionable contravention of public policy." (*Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Woods v. McCann*, 6 Dana, 366; *Marshall v. Baltimore & Ohio R. R. Co.* 16 How. 314; *Harris v. Roofs*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Bryan v. Reynolds*, 5 Wis. 200.) "The principle of these decisions has no relation to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or expected to be done under it. The law will not concede to any man, however honest he may be, the privilege of making a contract, which it would not recognize when made by designing and corrupt men. A person may without doubt be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition, or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them out of the legislative halls in favor of or against any fact or subject of legislation."

In *Clippinger v. Hepbaugh*, *supra*, it is said: "It matters not that nothing improper was done or expected to be done by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading

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necessarily, in the hands of designing and corrupt men, to the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive some, that is sufficient to stamp its character with the seal of disapprobation before a judicial tribunal." And to the like effect is *Brown v. Brown*, 34 Barb. 533; *Cook v. Shipman*, 24 Ill. 614; *Mills v. Mills*, 10 N. Y. 543; *Trist v. Child*, 21 Wall. 441; *Woods v. McCann*, 6 Dana, 366; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Harris v. Simonson*, 28 Hun, 318; *Usher v. McBratney*, 3 Dill. 385, n.; *Tool Co. v. Norris*, 2 Wall. 45; *McBratney v. Chandler*, 22 Kan. 692. The last case cited states the rule thus: "The contract of an attorney for services as such, whether the services are to be rendered before a court, a department of the government, or a legislative body, is valid, and upon performance of the service a recovery can be had. The contract of a lobbyist, in the sense in which that term is now used, for his services as such, is against public policy and void. When there is a single contract, and the services contracted for and rendered are partially those of an attorney, and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. That which is bad destroys that which is good and they perish together."

Construing section 638. Nor can we give our assent to the application which the learned circuit judge made of section 638 of the Criminal Code. That section provides: "If any person, having any interest in the passage or defeat of any measure before, or which shall come before, either house of the legislative assembly of this State, or if any person being the agent of another so interested shall converse with, explain to, or in any manner attempt to influence any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months, nor more than one year, or by fine not less than fifty dollars, nor more than five hundred dollars."

Points decided.

This section ought not to be so construed as to render any contracts valid which would have been void if it had not been enacted. Such was not its purpose. It does not render contracts valid, made to secure lobby services, if they were made under such circumstances that the lobbyist could not be punished criminally. This would be extending the effect of this enactment very much beyond what we conceive to have been its object. Its sole purpose was to make lobbying under certain conditions *criminal*, but not to make the employment of the lobbyist, even under the particular circumstances enumerated in the section, one that should receive the encouragement of the law. The instruction given by the court below is not in harmony with this construction, and was therefore erroneous. Such contracts as the one sued on are always closely and rigidly scrutinized by the courts when sought to be enforced. Nothing wrong may have been intended in this particular case, nor was it necessary. If the terms of the contract required any services to be rendered, or if the party employed in furtherance of the general purposes of his employment rendered or designed to render any services, either to cause or to prevent any legislative action otherwise than by publicly presenting the subject before the legislature or some of its committees, such contract cannot be enforced in this State.

It follows from the views expressed that the judgment of the court below must be reversed and a new trial awarded.

[Filed October 18, 1887.]

LILLIENTHAL & CO., APPELLANTS, v. V. CARAVITA
ET AL., RESPONDENTS.

APPEAL—ADVERSE PARTY.—L. & Co., having obtained a decree declaring a mortgage executed by V. C. to be fraudulent and void, and fixing the priority of certain lien holders, appealed from the latter portion of said decree, and did not make the fraudulent mortgagee a party to the appeal, nor did the latter take an appeal. *Held*, that mortgagee in such case was not an adverse party within the meaning of section 587 of Hill's Code, requiring the adverse party to be served with notice of appeal, the appeal being only to settle the priority of the liens of the creditors.

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NOTICE—ACKNOWLEDGMENT OF SERVICE.—Where an attorney acknowledges service of a notice of appeal as follows: "State of Oregon, county of Multnomah. Service of the within notice by certified copy is hereby admitted in Portland, Oregon, June 1, 1887. Alex. Bernstein, attorney for defendants,"—*held*, that the service was sufficiently proven.

APPEAL from Multnomah County.

Motion to dismiss appeal denied.

Alex. Bernstein, for Respondents.

H. Williams, for Appellants.

STRAHAN, J.—Counsel for respondents have filed a motion to dismiss the appeal in this cause for the following reasons: (1) That no appeal has been taken and perfected herein as by law required, in that all the adverse parties to this suit have not been served with any notice of appeal, nor made parties hereto, nor are they now before this court; (2) that the court has no jurisdiction herein, in that the alleged service of the notice of appeal upon the defendants' and respondents' attorney has not been properly made, nor is it of such a service as is by law required.

The object of this suit was to set aside a judgment confessed by V. Caravita, and an execution issued thereon as fraudulent, which was older and upon its face had priority over the plaintiffs' claim, as well as the claim of all the other defendants. By its decree the court below set the same aside, and from that part of the decree the plaintiff has not appealed, nor did the original plaintiff whose judgment was set aside appeal.

Objection is now made that this party, whose judgment and execution were set aside on the ground of fraud, was an *adverse party* within the meaning of section 527 of Hill's Code. We think otherwise. A party is not bound to appeal from a decree in his own favor, as a condition to being heard on his appeal from that part of the decree against him. In addition to this, the parties who made this motion are interested as well as the plaintiffs in the setting aside of the judgment and execution referred to. It was a fraud upon their right as well as the rights of the plaintiffs.

It seems that the only question on this appeal is one of priority. It is simply a contention as to who shall be first paid from the assets uncovered by the annulling of the fraudulent judgment. In *Thompson v. Ellsworth*, 1 Barb. Ch. 624, the term "adverse party" in this connection was held to mean the party whose interest in relation to the subject of the appeal is in conflict with the order or decree appealed from, or the modification sought for by the appeal. And in *Senter v. De Bernal*, 38 Cal. 637, it is said: "Our Code allows any and every party who is aggrieved to appeal without *joining any one else*, no matter what may be the character of the judgment against him, whether joint or several, and in this respect, works a change from the former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal *as to those not served* will prove ineffectual, and also *as to those served*, if the relief sought is of *such a character that it cannot be granted as to the latter without being granted as to the former also*." Here the only relief which is sought by this appeal can be granted without in any manner affecting the interests of the defendants not served.

Acknowledgment of service. We might pass the other objection without any particular notice, for the reason that the specific and particular objection relied upon in the argument is not pointed out in the motion. But, waiving this defect, is the admission of service sufficient? It is as follows:—

"STATE OF OREGON, }
"COUNTY OF MULTNOMAH. } ss.

"Service of the within notice by certified copy is hereby admitted in Portland, Oregon, June 1, 1887.

"ALEX. BERNSTEIN, Attorney for Defendants."

The particular defect claimed to exist in this admission of service is, that it does not appear that said attorney resided in Multnomah County at the time he admitted service. This admission was made by an attorney of this court, and is his solemn act for and in behalf of the parties whom he represented,

Argument for Appellant

and no such refined construction as is now insisted upon can be admitted. He knew what was implied by the term "service," and in the absence of anything in the record to show to the contrary, we must intend that "service" in this connection means all that the law requires to make it valid. In addition to this, it was made in Multnomah County, and we do not think that for the purpose of defeating this appeal, we ought to intend that the attorney resided elsewhere.

Let the motion to dismiss be overruled.

[Filed October 24, 1887.]

**THE OREGON AND WASHINGTON SAVINGS BANK,
APPELLANT, v. JOHN CATLIN, COUNTY JUDGE, ET AL.,
RESPONDENTS.**

TAXABLE PROPERTY—INDEBTEDNESS—HOW DEDUCTED FROM.—In order to be allowed a deduction for indebtedness, claimed before the board of equalization, the statement of the particular indebtedness must be made and sworn to, in accordance with section 2752 of Hill's Code.

PARTY—WHEN COUNTY MUST BE.—In a proceeding to correct an erroneous assessment, the county must be made a party defendant.

APPEAL from Multnomah County. **Affirmed.**

McDougall & Bower, for Appellant.

Review is the proper remedy. (*Rhea v. Umatilla County*, 2 Or. 698; *Poppleton v. Yamhill County*, 8 Or. 338.)

Deposits are indebtedness of the bank. (*Marine Bank v. Fulton*, 2 Wall. 252; *Graves v. Dudley*, 20 N. Y. 80.)

If petitioner's statement of indebtedness came within the statute (Hill's Code, § 2752), it was the duty of the board of equalization to allow the same. (Hill's Code, § 2778.)

The statement was properly verified. It refers to, and is made part of the original verified return.

McGinn & Simon, for Respondents.

All statements of assessable property must be sworn to. (Sess. Acts, 1880, 52; Cooley on Taxation [2d ed.] 357; *Lee v. Commonw.* 6 Dana, 311.)

LORD, C. J. — This is a writ of review brought by the Oregon and Washington Mortgage Savings Bank of Oregon to review the action of the board of equalization of taxes for Multnomah County, Oregon. The appeal is from the judgment of the Circuit Court of that county, affirming the decision of the board, and dismissing the writ. The facts alleged in substance are: That the plaintiff, at the time therein stated, filed with the defendants as such board, a statement of its assessable property in Multnomah County, together with a statement of its indebtedness. That thereafter, on application of the plaintiff, the board allowed and ordered the plaintiff to make an amended return, and that after the same was filed it was ordered by the board that the claim for indebtedness be disallowed, and that the bank be assessed for the amount as stated in such return. To this the plaintiff excepted, and sued out the writ, with the result as stated.

The grievance of the plaintiff is this: That it should be allowed to deduct from its taxable property as indebtedness the individual deposits of its customers. Before, however, the officer is authorized to make such deductions, when allowable, the statute requires the party assessed to make a sworn statement of facts enumerated therein. It provides, among other things, that "no such indebtedness shall in any case be deducted, unless it be real *bona fide* indebtedness, due from the person assessed, etc. Nor shall a deduction be made in favor of any person assessed, unless he or she delivers to the assessor a written statement, duly sworn to, specifying the name and place of residence of the creditor, the nature of the debt, the names of other parties, if any, who are liable therefor, and which statement shall show that the debt or portion thereof sought to be deducted has not been deducted in any other county or place in the State from the assessment of such person for that year," etc. (Hill's Code, § 2752.) The original list shows that the plaintiff

Opinion of the Court—Lord, C. J.

had a fraction over one hundred and forty thousand dollars, taxable property, according to its own sworn statement, and that it had only been assessed for about half that amount—seventy thousand dollars—or fifty per cent of the amount admitted to be subject to taxation. By what principle, or by authority of what law, this mode of taxation is authorized or permitted, we are unable to discover or to understand.

In this respect, the assessment, certainly, affords the plaintiff little reason for complaint. It shows, however, a deduction of one hundred and one thousand dollars was claimed as an indebtedness for deposits, without stating the facts required by the statute for which deduction for indebtedness is allowed. To obviate this defect, and to secure the deduction of indebtedness as claimed, the plaintiff was allowed and ordered to file an amended return, in which the facts upon which the deduction was based, as required by law, should be exhibited.

Instead of doing this, the plaintiff simply attached to the original list, or submitted several sheets of paper upon which were written the names of the individual depositors, and the amount deposited, with a statement that the deposits there mentioned were all due and payable at the bank.

It is needless to say that this was not a compliance with the law or the order of the court; nor such a statement as would enable the board to ascertain the right of the plaintiff to the deduction claimed. Nor was it sworn to, so that, if found to be false, the punishment which the law pronounces in such cases could be enforced. Mr. Cooley says: "In some States the list has been required to be given in under oath; and that where this is the statute, the tax-payer will take no benefit from the list unless it is sworn to." (Cooley on Taxation, 357.) Upon this point our statute is explicit.

Before a deduction for indebtedness can be made, the statement must not only be sworn to, but the facts specified must be stated as required by the statute. As this was not done, the board was not authorized to do otherwise than reject it. There is also another objection which is fatal to this proceeding, the county and not the board is the proper party. In *Wood v.*

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Riddle, 14 Or. 254, it was said by STRAHAN, J.: "In all analogous cases in this State, from *Thompson v. Multnomah County*, 2 Or. 34, to *Pruden v. Grant County*, 12 Or. 308, the county or other public corporation whose acts are to be reviewed must be a defendant, and must have the privilege of being heard before its acts can be annulled on writ of review.

The judgment must be affirmed.

[Filed October 25, 1887.]

ELIZABETH CRANE, RESPONDENT, v. E. S. LARSEN
ET AL., APPELLANTS.

ABATEMENT—SUIT PENDING.—The Code of this State allows the filing of an answer by way of plea in abatement, setting forth the pendency of another suit between the same parties, for the same cause of suit. It is immaterial that a third party is joined in the former suit.

PLEADING—ANSWER.—An answer must set forth the facts relied upon as a defense, and not the conclusions to be deduced therefrom.

SAME—PRACTICE.—Where the answer shows the pendency of another suit, but does not properly plead the necessary facts, it is error to allow the two causes to proceed independently of each other. The latter should be stayed until the determination of the former, or the two causes should have been consolidated and tried together.

APPEAL from Multnomah County. Remanded.

Facts are stated in the opinion.

George H. Durham, and George W. Yocum, for Appellants.

The pendency of a prior suit will be cause for abatement without inquiry. (*State v. Dougherty*, 45 Mo. 294; *Gransby v. Ray*, 52 N. H. 513.)

This is a suit in equity and not an action at law; and the same rule governing an action at law does not obtain in equity in matters of abatement. It is immaterial upon which side of the case the plaintiff in this suit was in the former suit; nor whether defendants in this suit were plaintiffs or defendants in the former suit. And it is immaterial whether there are more parties on either side in the former suit than there are in

this suit. (Mitford's Equity Pleadings, 247, 248; *Rowley v. Williams*, 2 Wis. 151; Beames Pleas in Equity, p. 143, and foot notes to Beames, p. 143; *Durand v. Hutchinson*, Coop. Tr. 273; cited in Metf. Tr. 199; Mitford & Tyler's Pl. and Prac. in Equity, pp. 336-338; 3 Paige, 509; 3 Atk. 597; Story on Equity Pleadings, §§ 740, 744.)

H. Y. Thompson, and *Watson, Hume & Watson*, for Respondent.

The parties must be the same, and here the answer itself shows they are not. (*Adams v. Gardner*, 13 Mon. B. 197; *Bennet v. Chase*, 21 N. H. 570; *Langham v. Thomason*, 5 Tex. 127; *Hall v. Holcombe*, 26 Ala. 720; *Estes v. Worthington*, 30 Fed. Rep. 465.)

And the parties must appear on the same side of the record in both suits. The same parties must be either plaintiffs or defendants in both suits. (2 Estee's Pleadings, §§ 3100, 3236; *Wahworth v. Johnson*, 41 Cal. 61; *Certain Logs of Mahogany*, 2 Sum. 593; *Wadleigh v. Veazil*, 3 Sum. 165; *New England Screw Co. v. Bliven*, 3 Blatchf. 243; *Smith v. Blatchford*, 2 Ind. 184; *O'Connor v. Blake*, 29 Cal. 313; *Compton v. Green*, 9 How. Pr. 228.)

The presumption is that all the defendants in the former suit are necessary parties. That respondent might have litigated all her rights, as defendant in the former suit, is not enough. (*Osborn v. Cloud*, 22 Iowa, 104.)

She did not begin the prior suit, and has no control over it. If she had, she could have dismissed it even after the plea in abatement was entered, and a reply of such dismissal would have been good. (*Marston v. Lawrence & Dayton*, 1 Johns. Cas. 397; 1 Barn. & C. 649; *Beal v. Cameron*, 3 How. Pr. 414; 4 Hill, 166; *Averill v. Patterson*, 10 N. Y. 500.)

THAYER, J.—The respondent commenced a suit in the said Circuit Court for Multnomah County, against the appellants, for a settlement of partnership business arising out of an alleged partnership between the said parties. The appellants interposed

as an answer the following matter, viz. (omitting title): "Now, on this day, comes the above-named defendants, and for answer to the plaintiff's complaint, states that at the time of this suit there was, and now is, another suit pending in the said Circuit Court of the State of Oregon, for the county of Multnomah, between the same parties to this suit, and for the same cause, in which said suit, pending as aforesaid, the defendants in this suit are plaintiffs, and the plaintiff in this suit is one of the defendants in said suit pending at the time of the commencement of this suit. And these defendants allege that the same subject-matter involving the settlement of the partnership affairs set forth and stated in the complaint in this suit is set forth and stated in the complaint in said former suit as the cause of suit; and that the plaintiff in this suit appeared in said former suit by her attorneys, and filed her answer thereto; and that said former suit is now, and has been at all the times herein mentioned, pending in said court, and still remains undetermined. Wherefore, defendants pray that the complaint of the said plaintiff may be dismissed, and that defendants may recover their costs and disbursements herein."

The respondent demurred to the answer upon the following grounds: (1) That the said answer did not state facts sufficient to constitute a defense. (2) That it showed upon its face that the former suit pleaded therein was not between the same parties to this suit. (3) That said answer showed upon its face that the plaintiff in this suit was not the plaintiff in said former suit.

The court sustained the demurrer, and the respondents having refused to further plead, their default was entered, and the case referred to a referee to state an account between the parties, which the referee reported to be \$3,519 in favor of the respondent and against the appellants. The court confirmed the report, and entered the decree thereon, from which this appeal is taken.

The only question of law for our determination is the sufficiency of the answer as a defense to the suit. The respondent's counsel make two points upon the question of its sufficiency: (1) That the answer shows that the suit herein is not between the same parties as the former suit; and (2) that a defendant,

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who is plaintiff in a former suit, has no right to interpose such a defense when sued by the former defendant, although the two suits involve the same subject-matter.

The appellant's counsel contend that the same degree of strictness, as to the rule that parties must be the same in both cases, is not observed in equity as at law, and that, therefore, the first ground is not maintainable, and they deny that the second ground is correct. The defense "that there is another action pending between the same parties for the same cause," under the Code of this State, is made applicable to suits in equity as well as actions at law, and in view of that fact, I am not able to discover how any discrimination can be made in the two classes of procedure, as contended for. The Code, in certain respects, maintains a distinction between actions and suits, but in others, the same provisions are made applicable to both. In its interpretation the rules that formerly prevailed may be consulted, doubtless, with profit; but to undertake to apply the more technical rules of the common law to law cases, and the more liberal ones of equity to equity cases, when the statute provides the same mode of procedure for both, would, it seems to me, be judicial legislation. The Code provides "that the forms of pleading in courts of record, and the rules by which the sufficiency of the pleadings are to be determined, shall be those prescribed by the Code." (Civ. Code, § 62.) Rules which governed under a former system, therefore, in regard to the effect of the pendency of a former action or suit as an abatement of a subsequent one, are important only as aids in the construction of present ones. The letter of the Code in such cases must govern where its meaning is obvious, and where its meaning is doubtful, resort must be had to those tests which the wisdom of ages has established as the most reliable means of ascertaining legislative intention. The Code allows the fact that there is another action or suit pending between the same parties, for the same cause, to be pleaded by way of answer, when it does not appear upon the face of the complaint. The meaning of this provision is plain to any person of ordinary intelligence. The evident object of it was to prevent unnecessary litigation; to avoid a second lawsuit,

where the identical matter was at issue between the same parties in a former one; and if there were other parties in the former suit not included in the subsequent one, it would not necessarily prevent the pendency of the former one from being a defense to the latter; nor would the fact that the parties, plaintiff and defendant, were reversed in the two suits prevent the defense, if the issue in the two were the same and the same relief attainable.

I do not believe, either, that it is necessary that the parties should be identical in both suits, in order to admit the defense; I think privies would be included as well. I think the term "parties" includes privies. If A, therefore, were to commence an action against B, and then assign his cause of action, or some part thereof, to C, and the latter commence an action thereon, the defense of a former action pending between the same parties for the same cause would be available under a fair construction of the provision of the Code referred to.

Pleading the former suit. But the answer in such cases should aver facts showing clearly that the former action or suit was in substance and effect between the same parties and for the same cause. It would not be sufficient to allege the mere deduction from facts. Under the former equity practice the defendant's plea had to set forth with certainty: (1) The commencement of the former suit; its general nature, and the character and object and relief prayed. (2) That the second suit was for the same subject-matter as the first. (3) A statement, not only that the same issue was joined in the former suit as in the second, and that the subject-matter was the same, but also that the pleadings in the former suit were taken for the same purpose. And the plea had to aver, also, that there had been proceedings in the suit such as appearance, or process requiring an appearance, at least. (Story on Equity Pleadings, § 737.) The truth of the plea, then, had to be established by proof.

The defendant, at the time of filing the plea, had to obtain an order of reference to a master to examine and report whether the plea be true, and procure his report to that effect; and if he neglected to procure such report within twenty days, or the report was against the verity of the plea, it would be considered as

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overruled, and the complainant might proceed as if no such plea had been filed. (1 Barb. Ch. 125.) I am of the opinion that the answer was not sufficient to justify an abatement of the subsequent suit; that under the circumstances of the case the appellants should have set forth the facts of the former suit fully; should have stated the nature and object of the suit and the relief demanded, so that the court could have seen, from an inspection of it, that the respondent could have litigated her claim therein, and have obtained all the relief she could obtain in the subsequent one. The averments of the answer, under the peculiar circumstances of the case, are too much in the nature of conclusions. The former suit is in their favor, and against the respondent and another, or others. This is apparent from its language; and the circumstance is such as to require, as I view it, a full statement of facts as to the nature and object of the suit, and of the issue joined therein.

We do not approve, however, of the course pursued by the Circuit Court in allowing the two cases to proceed independently of each other. Such practice would necessarily lead to confusion and embarrassment. The court should either have stayed proceedings in the subsequent suit until the prior one was determined, or have consolidated the two and had the controversy closed out in one litigation. The matter is too important to be determined virtually upon mere technical proceedings. The decree appealed from should be set aside, and the cause remanded to the court below, with directions to consolidate the two suits and order another reference to take an account between the parties; that the appellants have the right to appear at the hearing before the referee, and establish any proper claim they may have against the respondent growing out of the affair between the parties, relevant to the cases; but that they be required to pay the taxable costs and disbursements of the reference already had, as a condition of the right herein granted; neither party to recover costs of appeal, and each to pay one half of the clerk's fees in this court.

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[Filed October 25, 1887.]

15 851
38 164**H. W. DICKEY, RESPONDENT, v. D. V. B. HENARIE,
APPELLANT.**

LEASE, UNRECORDED—NOTICE OF TERMS OF.—A lessee of a cigar store in a building which contained, also, a saloon separate from the cigar store, who by the terms of his lease had the exclusive privilege of selling cigars and tobacco in the saloon, gave notice at a sheriff's sale by an attaching creditor of his lessor, prior to the sale, but subsequent to the levy of the attachment, that he had a sublease of the cigar store. *Held*, (1) That when he stated that he had a sublease of the cigar store, the purchaser had the right to accept his statement, and was not bound to inquire further into the terms or extent of the lease. (2) It was immaterial, when he undertook to state what the lease was, whether or not the contract was in writing. (3) That it could not be inferred from his statement that he had a lease of the cigar store; that the lease extended to other parts of the building, and the purchaser was not thereby put upon inquiry as to other parts. (4) That it was misleading to instruct the jury in such case that when a party gives notice that his contract was in writing, "that was notice of all that the writing contained," and that if the purchaser or his agent had been notified at the time of the sale that there was a lease, and had reasonable grounds to believe that it was in writing, they were bound to inquire into the contents of the lease, and the law bound them by its contents.

IMPLIED NOTICE—DUTY OF COURT TO INSTRUCT AS TO.—It is error for a court to submit to the jury, as a question of fact, "what a reasonable or prudent man would have done towards finding out the rights of the sub-lessee." The duty of the judge was to tell the jury what the duty of the purchaser was, in case they found that he had notice of the rights of the sub-lessee.

ATTACHING CREDITOR—NOTICE TO.—Under section 150 of Hill's Code, an attaching creditor is deemed, and he occupies the same position as a purchaser in good faith for a valuable consideration. And an instruction, "it is sufficient if defendant was notified of the adverse claim any time before sheriff's sale," *held*, to be error.

APPEAL from Multnomah County. Reversed.

Gearin & Gilbert, for Appellant.

T. A. Stephens, and *F. A. E. Starr*, for Respondent.

THAYER, J.—The respondent commenced an action against the appellant in the Circuit Court of Multnomah County, to recover damages in consequence of being deprived of an alleged right to sell cigars and tobacco in the Argonaut Saloon, in the city of Portland.

It appears that one Edward Martin owned a leasehold interest in a certain portion of "Green's Building," situated at the north-east corner of First and Alder streets in said city. The portion

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of said building was the store formerly occupied by A. I. Weiler & Co., and from whom said Martin leased. That the said Martin, on the twentieth day of March, 1886, sublet to the respondent the north front portion of said store for a cigar stand; the other portion thereof was used by him, said Martin, for the said saloon. The letting by Martin to respondent was for the term of two years, and the lease contained a clause "that in consideration of the covenants therein contained upon the part of the said H. W. Dickey, to be kept and performed by him, the said Edward Martin leased, demised, and let unto him all of that certain portion of what was known as 'Green's Building,' then being fitted up and occupied as a cigar stand, being the north front portion of said store, together with the exclusive right and privilege to sell, vend, and have sold, in and upon the entire premises formerly occupied by the firm of A. I. Weiler & Co., cigars and tobacco, during the entire term of the lease of said premises from the said firm to the said Edward Martin." That on the fifth day of May, 1886, the appellant, in an action against said Edward Martin, attached his interest in the entire premises; that at the time of the attachment, the respondent was in possession of the cigar store; that it fronted upon the street, and was partitioned off from the saloon, but communicated with it by means of a small window which could be opened and closed.

The sheriff, when he levied the attachment, closed up the saloon, and it remained closed until the sheriff's sale on the twenty-fourth day of October, 1886, at which time it was bid in by one Conroy for appellant. The respondent during the time the saloon was closed remained in possession of the cigar stand the same as before the attachment. The appellant, after purchasing Martin's interest in the leasehold estate, again opened and continued to carry on the saloon, but refused to recognize the respondent's right "to sell, and have sold," cigars and tobacco, as provided in his lease from Martin, which was the grievance complained of.

The case was tried by jury, who returned a verdict in favor of the respondent for the sum of five hundred dollars, upon which the judgment appealed from was entered.

A question seems to have been made at the trial, as to whether the appellant was legally required to allow the respondent such privilege claimed by him, in regard to selling cigars and tobacco in the saloon. The latter's lease from Martin was in writing, but not upon record, and a question arose as to whether the appellant, or his agents, had any notice of there being any such lease. In order to prove such notice, the respondent testified at the trial that at the time of the sheriff's sale he gave notice to the sheriff, and the latter to all the by-standers, including the appellant's agents, that he had a sub-lease of the cigar store. The sheriff also testified to the same effect. This seems to have been all the testimony there was concerning notice. There was evidence that one O'Brien, an agent of the appellant, knew prior to the attachment that the respondent had the exclusive right of furnishing all the cigars sold in the saloon, but it was not contended that the said agent was informed that the respondent had the lease from Martin, nor that the appellant, or any of appellant's agents, had any such information.

The court gave the following charge to the jury: "(1) The rule of law is substantially this: When a party gives notice to another and says that his claim is in writing, that is notice of all that the writing contains. (2) I submit this question, whether the manner in which this notice was given would lead defendant to know that a writing existed. (3) If you find general notice of claim and possession of part of the premises, then you should find whether a reasonable man or a prudent man would have inquired further. (4) The right to sell cigars in the main saloon is as much a part of the grant as the exclusive possession of the cigar store proper. (5) It is not necessary that the defendant should have had notice of the plaintiff's claim at the time of the attachment. It is sufficient that he was notified prior to the sheriff's sale. (6) If Conroy, the purchaser, and Henarie and O'Brien, his agents, had notice at the time of the sale by the sheriff, that Dickey claimed a lease of the cigar store in fact, I leave it, to you as a question of fact whether a reasonable man would not inquire of Dickey as to the terms and conditions of the lease. It was not necessary that they should

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have read the lease, but if they had been notified at that time that there was a lease, and had reasonable ground to believe that it was in writing, they were bound to inquire into its contents, and the law bound them thereby."

To each of these instructions the appellant duly objected and excepted.

The questions in the case arise out of the court's instructions. It seems to me that they are all faulty, unless it be the fourth.

The first one, that when a party gives notice to another, and says that his claim is in writing, that is notice of all that the writing contains, cannot be correct. Saying that the claim was in writing might make it the duty of the person to whom it was said to inquire as to the contents of the writing, and cases might arise where if such person failed to make the inquiry, he would be deemed to have been guilty of a degree of negligence fatal to his claim to be considered a *bona fide* purchaser. (*Williamson v. Brown*, 15 N. Y. 354.) In this case, however, the respondent stated what he had, a sublease of the cigar store. What more could be inferred from that than what the words implied? Would any one suppose that because he had a sublease of the cigar store, he had also the exclusive right and privilege to sell, vend, and have sold cigars and tobacco in the saloon? Whether the lease was in writing or not was of no consequence; he said what it was, and the appellant could not have supposed it contained anything more than what he said. If he had said that he had a claim to the premises, and that it was in writing, it would then have behooved the appellant to inquire regarding the contents of the writing—to have sought an inspection of it; but under the circumstances, he had no occasion to make any inquiry. The respondent stated what he had, and the appellant accepted the statement. If a person were about to purchase a farm, and an occupant were to say that he had a lease of the orchard, the purchaser would not be informed that the occupant also had a right to the meadow or wood land, or have information sufficient to put him upon inquiry as to any such right. Good faith in such a case demands that a party state fairly and fully the extent of his claim; otherwise, persons dealing legiti-

mately in regard to the property would be liable to be misled to their prejudice.

The second instruction was misleading. It left the jury to infer that if the manner in which the notice was given led the appellant to know that a writing existed, it would make him chargeable with all it contained. Such might have been the case had the respondent not have said what his right was; but when he said that he had "a sublease of the cigar store," he might reasonably be supposed to have stated the extent of his right. The statement tended to negative any right to the saloon.

The third instruction was also misleading. I cannot see that a reasonable or prudent man, having general notice that the respondent claimed and had possession of the cigar stand under the circumstances of this case, should have inquired whether he had not been granted the right to vend cigars in the saloon, or any other right in regard to the saloon. The respondent made known his right, and the appellant had the right to suppose that he was claiming the extent of it. The court charged the jury that the right to sell cigars in the main saloon was as much a part of the grant as the exclusive possession of the cigar store proper. Conceding this, yet it does not follow that, because the respondent was vested with the latter right, he had also been granted the former. The fact that the cigar store was partitioned off from the saloon would, it seems to me, imply that the respondent's cigar business in that locality was circumscribed. In any event, that fact, in connection with the claim he interposed, would not incite any inquiry as to whether another and additional right had not been granted him, however reasonable or prudent a man he might be.

The form of the instruction, it seems to me, is objectionable. The jury were directed, if they found general notice of claim and possession of a part of the premises, to find whether a reasonable man or a prudent man would have inquired further, but were not informed as to the law upon the subject; nor do I think it should have been left to the jury as to whether a reasonable man or a prudent man would have inquired further in the event suggested. I think the court should have told the jury what the

Points decided.

appellant's duty was, in case they found the general notice of claim and possession of a part of the premises referred to in the charge, and not left them to speculate upon what a reasonable man or a prudent man would have done in the premises, and to draw their own inference as to the result of their finding.

The fifth instruction is in direct conflict with the provision of the statute upon the subject. Section 148 of the Civil Code provides, that "from the date of the attachment until it be discharged, or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property." This court, in *Boehreinger v. Creighton*, 10 Or. 42, held that under this provision, an attaching creditor without notice of a prior unrecorded deed of the property, made by the debtor in the writ to a third person, was not affected by such deed, and recognized the right of such creditor as attaching from the time of the levy, and as having priority over such deed where the creditor had not received notice of it prior thereto.

The sixth instruction stands upon the same footing as the others referred to as being faulty. The case will therefore have to go back for a new trial.

Judgment reversed, and new trial ordered

[Filed October 31, 1887.]

S. AND G. GUMP, APPELLANTS, v. HALBERSTADT
AND LEWIS, RESPONDENTS.

STATUTE OF FRAUDS — PAROL PROMISE UNDER. — A parol promise by L. to appellants that if they would forbear to sue H. for a debt, he, L., would within a reasonable time pay, or cause said debt to be paid to appellants, in consideration whereof, the appellants refrained from suit, held, to be void under the Statute of Frauds.

APPEAL from Multnomah County. Affirmed.

Alex. Bernstein, for Appellants.

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We contend that the promise, founded upon a new and original consideration, moving directly between the respondent Lewis and appellants, made and created an original agreement between the respondent Lewis and appellants, and under the classifications laid down by Chancellor Kent, is not within the Statute of Frauds, and need not be in writing to be enforced against the promisor. (*Leonard v. Vredenberg*, 8 Johns. 29; *Farley v. Cleveland*, 4 Cowan, 432; *Ludwick v. Watson*, 3 Or. 256; *Mallory v. Gillett*, 21 N. Y. 412; *Spooner v. Dunn*, 7 Ind. 81; 63 Am. Dec. 414; *Brown v. Tipton*, 1 Atl. Rep. 861.)

Williams, Ach & Wood, for Respondent Lewis.

A collateral obligation is a secondary one, and is simply an agreement to answer for the "debt, default, or miscarriage of another." By an original undertaking, the promisor would be substituted for the debtor, and become primarily liable.

This action was brought against Halberstadt, the maker of the note, and Lewis. The prayer in the complaint asked for judgment against both, and the summons was directed to both. This clearly shows that the plaintiffs never intended to release the original debtor, Halberstadt, from his obligation, but looked upon Lewis only as an additional security for the debt; and therefore his promise, not being in writing, cannot be enforced.

In support of our position, we call attention to the elaborate opinion of the court in the case of *Mallory v. Gillett*, 21 N. Y. 412, cited by appellants. We also refer to *Nelson v. Boynton*, 44 Mass. 396; *Waldo v. Simonson*, 18 Mich. 344; *Peabody v. Harvey*, 4 Conn. 122.

LORD, C. J.—This was an action to recover money, which was tried by the court without a jury, and judgment entered upon the following findings of fact and conclusions of law: (1) That on October 1, 1884, the defendant Joseph Halberstadt, being indebted to plaintiffs, on that day executed and delivered to them his certain promissory note in writing, bearing date October 1, 1884, whereby Halberstadt promised to pay, ninety days after date, to the order of plaintiffs, \$88.40.

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(2) That afterwards said defendant paid on said note the sum of \$35.86, and at the date of the commencement of this action there remained due and unpaid on said note the sum of \$52.56, which is still due and unpaid. (3) That on the ——— day of September, 1885, the plaintiffs, being the owners and holders of said promissory note, were proceeding to collect the same from the defendant Halberstadt, and had already taken proper legal steps to bring an action on said note against Halberstadt, and to levy an attachment on his property, of which doings of the plaintiffs the defendant Lewis then and there had due notice.

Whereupon the defendant L. H. Lewis requested the plaintiffs to forbear to sue said Halberstadt on said demand, and then and there promised to plaintiffs, that if plaintiffs would forbear at that time to sue said Halberstadt, he, said L. H. Lewis, would, within a reasonable time thereafter, pay, or cause said debt of said Halberstadt to be fully paid to plaintiffs. That a reasonable time after said promise of defendant Lewis had elapsed before the commencement of this action; and no part of this demand has been paid, except \$35.86, as aforesaid, and said Lewis failed and wholly neglected to pay or cause to be paid any part of the balance of \$52.56 due on said note as aforesaid. (1) That the promise of said Lewis to pay or cause to be paid said demand against said Halberstadt, not being in writing, was void, and he is not bound thereby. (2) That said defendant L. H. Lewis is entitled to judgment for his costs and disbursements.

There is but one question presented by this appeal, and that is, whether the verbal promise of the defendant Lewis to pay the debt, or balance due on the note, in consideration that the plaintiffs would forbear to sue and attach the property of the defendant Halberstadt, was void by the Statute of Frauds.

It is provided by the Code that: "In the following cases the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, etc. (2) An agreement to answer for the debt, default, or miscarriage of another." (Code, § 775.)

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It is admitted that no writing of the defendant's promise was given, or that he received any consideration or benefit for his promise to pay the debt of the defendant Halberstadt. Nor did the plaintiffs intend to release the original debtor, Halberstadt, from his obligation, as the present action indicates, but regarded the defendant Lewis only as an additional security for the debt, the debt itself still remaining in full force and unaffected by the transaction. It was clearly an agreement to pay or answer for the debt of another, without any consideration inuring to the defendant Lewis, who made the promise, and not being in writing, falls within the language of the statute, and is void. It may be that to forbear to sue and attach, or to discontinue a cause, and to relinquish property attached, would constitute an adequate consideration for the promise of the defendant Lewis; but this does not remove the difficulty unless the agreement is in writing. To forbear to sue when requested was a sufficient consideration at common law to support the promise, and it is still a sufficient consideration if *expressed* in writing as required by the statute.

"The mere fact," says Mr. Reed, "that the consideration of the guaranty is a forbearance on part of the promisee to proceed against the party answered for, will not make an exception to the statute." (1 Reed on the Statute of Frauds, § 38, and notes of authorities; Baylies on Sureties and Guarantors, § 12, p. 80, n. 2.) In *Watson v. Randall*, 20 Wend. 201, it was held that an agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory it must be in writing. "The cases are all uniform on the point," said Nelson, C. J., "that the promise to pay in consideration of forbearance is within the statute." "To bind one, therefore," said Shaw, C. J., "for the debt or default of another, two things must concur: *First*, a promise on good consideration; and *secondly*, by evidence thereof in writing." (*Nelson v. Boynton*, 3 Met. 396.) The general rule is stated to be that while the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing; but there is an exception to this

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rule, to which we may presently advert. Roane, J., said: "The distinction seems to be this: that where the person on whose behalf the promise is made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is considered as collateral, and must be in writing." (*Waggoner v. Gray*, 2 Hen. & M. 612.) An agreement to forbear suit against the original debtor at the request of a third person to answer for the debt is a collateral promise, and is within the statute, and void unless in writing.

In *Robinson v. Gilman*, 43 N. H. 491, Bell, J., said: "To except a promise from the statute, it is never sufficient that the promisee has agreed to allow time to the debtor (*Jackson v. Rayner*, 12 Johns. 291; *Smith v. Ives*, 15 Wend. 182; *Packer v. Willson*, 15 Wend. 343; *Watson v. Randall*, 20 Wend. 201), or to forbear to bring a suit against him at the time (*Simpson v. Patten*, 4 Johns. 422; *King v. Wilson*, 2 Strange, 873; *Fish v. Hutchinson*, 2 Wils. 94; *Kirkham v. Marter*, 2 Barn. & Ald. 613; 1 Saund. 211 a), or has discharged suit against him (*Nelson v. Boynton*, 3 Met. 396; *Tomlinson v. Gell*, 6 Ad. & E. 564), or has released to the debtor any lien (*Mallory v. Gillett*, 21 N. Y. 412; *Fay v. Bell*, Lalor, 251), or pledge (*Clancy v. Pigott*, 2 Ad. & E. 473), or an attachment (20 Wend. 184), or levy." (*Mercum v. Mack*, 10 Wend. 461; *Charter v. Beckett*, 7 Term Rep. 201.) Mr. Brown holds that the mere relinquishment of a lien by the creditor does not take the promise out of the statute. (Brown on Statute of Frauds, pp. 195–204; Brandt on Suretyship, § 50; 1 Reed on Statute of Frauds, § 38.) In *Nelson v. Boynton*, 3 Met. 396, the creditor sued his debtor and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the action. This was done, and the lien of the attachment lost, but the debt remained against the original debtor. After a careful discrimination of the authorities, Shaw, C. J., declared that the promise was void because not in writing. In *Mallory v. Gillett*, 21 N. Y. 412, the plaintiff had performed repairs on a boat which was in his possession, having a lien on it for the value of his work. He refused to part with the possession until

the lien was satisfied, when the defendant promised, if he would deliver the boat to the owner, he would pay the amount due, whereupon the boat was delivered to the owner. It was held that the engagement or promise, being to pay the debt of another, was void, because there was no note or memorandum thereof in writing. (See, also, *Waldo v. Simonson*, 18 Mich. 345; *Stewart v. Campbell*, 58 Me. 430.)

The findings in the case at hand do not indicate definitely that a suit was actually begun, and a lien created, under the attachment which was relinquished by the plaintiffs by reason of the promise of the defendant Lewis, but rather that legal steps were being taken to begin a suit for that purpose, which the defendant Lewis knew, and by his promise to pay the debt, induced the plaintiffs to forbear to prosecute. The findings ought to have been made more definite, but in this view, the case has no footing to stand upon. The oral argument, however, assumed and seemed to concede that a suit has been actually commenced, and a levy made, under an attachment which the plaintiffs had abandoned by discontinuing their suit at the request of the defendant Lewis, on his promise to pay the debt of the defendant Halberstadt; and on this theory it was claimed that the promise of the defendant Lewis was not founded upon forbearance alone, but the added new and original consideration of harm or prejudice to the plaintiffs, as one of the newly contracting parties, which the relinquishment of the lien by discontinuance of the suit involved.

In *Dunlap v. Thorne*, 1 Rich. 213, Butler, J., said: "When one person has a complete and enforceable lien on the property of his debtor, a promise of a third to pay the debt on condition that the property under the lien is given up, will be held binding, and not within the Statute of Frauds. This, upon the ground that the release of the lien is the surrender of a security operating in the nature of a payment, and therefore, if not a benefit to the promisor, is a prejudice to the creditor to the extent of his loss." (See, also, *Shook v. Vanmater*, 22 Wis. 507.) But this view does not seem to be well sustained on principle or authority, and is subjected to a crushing criticism by Mr.

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Brandt, in which he suggests precisely what is the fact in the case at hand, that the surrender of the lien does not usually extinguish the original debt, and that when it does have that effect, the promise is not within the statute. He says: "The surrender of the lien being a detriment to the creditor, is undoubtedly a sufficient consideration for the promise; but why it should take the promise out of the statute any more than any consideration which is a detriment to the creditor, or in fact any other sufficient consideration, it is difficult to perceive." (Brandt on Suretyship, § 50.) In *Curtis v. Brown*, 5 Cush. 488, Shaw, C. J., said: "It is not a sufficient ground to prevent the operation of the Statute of Frauds, that the promisee has relinquished an advantage, or given up a lien, in consequence of the promise, if that advantage has not also directly inured to the benefit of the promisor. The cases in which it has been held otherwise are those where the promisee has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by such relinquishment the same interest or advantage has inured to the benefit of the promisor. In such case, although the result is that the payment of the debt of a third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the promisor of the promisee of the lien, right, or benefit in question." (*Wills v. Brown*, 118 Mass. 138; *Furbish v. Goodnough*, 98 Mass. 296.) In *Fullam v. Adams*, 37 Vt. 401, Poland, C. J., said: "We believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in hands funds, securities, or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund."

While it is true that some of the authorities cited indicate that the promise must be an original undertaking or a valid consideration, moving from the creditor to the promisor, to take the case out of the statute (*Wills v. Brown*, *Furbish v. Goodnough*, *Robinson v. Gilman*, *supra*), others indicate that it makes no difference in regard to the party, debtor or creditor,

Argument for Appellant.

from whom the consideration moves, to have that effect (*Fullam v. Adams, Mallory v. Gillett, supra*), a distinction which makes no difference, so far as affects this case, as there is no pretense that the relinquishment of the lien inured to the benefit of the defendant Lewis, or that he held any funds or securities or other property of the defendant Halberstadt to be devoted to the payment of the debt.

As the case stated is not within the exceptions of the statute which makes such parol promise binding, there was no error, and the judgment must be affirmed.

[Filed November 7, 1887.]

JOHN FOSTER, APPELLANT, v. PETER SCHMEER,
RESPONDENT.

AGENT—CONTRACT BY.—Respondent purchased one half a dairy for two hundred dollars, and obtained the refusal of the other half at the same price. The appellant told him to go and buy it for him, whereupon respondent bought the other half of the dairy and a horse included for two hundred dollars. *Held*, that the respondent having acted as the agent of appellant, the latter was entitled to the benefit of the purchase, and was the owner of one half the horse.

CONTRACT—PLEADING TO REFORM.—In order to have a contract reformed, the pleading should set out what the contract was as the parties made it, and why its terms happened to be left out, or how terms not agreed upon came to be inserted.

SAME—PROOF REQUIRED TO REFORM.—In all cases to reform a contract, the court will require strong and convincing proof of the mistake; but where mistake is shown, that, if not corrected, would operate to the prejudice of a party, and which did not occur through the party's carelessness or negligence, the court will correct it.

APPEAL from Multnomah County. **Modified.**

Facts are stated in the opinion.

Alfred F. Sears, Jr., for Appellant.

Proof in order to reform a contract must be free from all doubt.
(3 Greenleaf on Evidence, § 360; 2 Pomeroy's Equity, § 859;
1 Story on Equity Jurisprudence, § 157; *Shiveley v. Welch*, 2
Or. 288; *Newsome v. Greenwood*, 4 Or. 123; *Remillard v. Pres-*

15	363
28	274
15	363
36	577

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cott, 8 Or. 43; *Stephens v. Murton*, 6 Or. 196.) These last two cases as to the necessity of a mutuality of mistake. (*Smith v. Butler*, 11 Or. 46.)

Strode & Beach, for Respondent.

When the deed sought to be reformed shows imperfections, this fact shows that the contract does not express the intention of the parties. (*Ramsey v. Loomis*, 6 Or. 374.)

Proof to establish mistake must be clear from mistake. (*Newsome v. Greenwood*, 4 Or. 119; *Smith v. Butler*, 11 Or. 46; *Hutchinson v. Ainsworth* 15 Pa. Rep. 82; *Benson v. Maskoe*, 33 N. W. Rep. 38.)

THAYER, J.—This appeal comes here from a decree of the Circuit Court for the county of Multnomah. The appellant commenced a suit in that court against the respondent for an accounting, after a dissolution of copartnership theretofore existing between said parties.

The contract of copartnership is alleged in the complaint to have been under and in pursuance of certain written articles signed by them, and of which the following is a copy:—

“This agreement made this first day of March, 1886, between John Foster and P. Schmeer, both of Multnomah County, Oregon, witnesseth, that the said Foster and Schmeer have hereby agree to carry on and conduct, jointly, a milk or dairy business, in said county, under the following terms and conditions, to wit: The said Schmeer shall supply, at his own cost and expense, one half the number of all the cows necessary for said business; also pay for one half of all the feed that may have to be bought; and for all articles, implements, or supplies required for carrying on the said business. The proceeds of said business shall be divided equally between the said Foster and Schmeer, at such times and in such a manner as to them seems proper. This agreement to be and remain in force for the term of one year, from the first day of March, 1886.

“It is further mutually agreed that upon the termination of this agreement, the said Foster may repurchase the six cows he

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sold to said Schmeer at the same price he received from said Schmeer, to wit, the sum of \$180.

“Witness our hands and seals this seventh day of August, 1886.

“PETER SCHMEER. [SEAL.]

“JOHN FOSTER. [SEAL.]

“Witness: A. M. STANSBERRY.”

It is further alleged in the complaint that by virtue of said agreement the parties entered upon said business therein referred to; that appellant complied with all the conditions of the agreement upon his part; that he had advanced considerable sums of money and furnished feed on account of the copartnership business largely in excess of his share as a partner; that said advances amounted to over \$300 more than his proportion, and that the respondent had refused to enter into any accounting or repay his shares of the advances.

The respondent filed an answer to the complaint, denying that he entered into any copartnership with appellant under said agreement, or any agreement except an agreement in the dairy and farm business, and denied all the other material allegations of the complaint. And for further answer and counterclaim alleged that the said agreement was erroneous in that, by mutual mistake of the parties thereto, they omitted to state, as was their intention, that the partnership was formed for the purpose of carrying on a farming business as well as a milk business; that the respondent was to put in the trade and good-will of a milk business, then possessed by him, together with his knowledge of said business, also the use of three horses, one-half interest in a milk wagon, and in fifty milk cans; that appellant was to furnish, as his share of the capital stock, the use of one half of all the cows needed in said business, the use of his farm on Columbia Slough, the use of three horses, one-half interest in a milk wagon, and fifty milk cans, and pay for one half of all feed and one half of all articles, implements, and supplies that would have to be bought for carrying on said milk and farming business; and that in order to make said agreement conform to the actual intentions of the parties, it was necessary that the same

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should be reformed and amended so as to include said matters, and that in pursuance of said last-mentioned agreement the parties entered upon said business. There followed an allegation that the parties, during the continuance of said business, had, down to the 1st of January, 1887, accounted at or near the end of each month for the business transacted during the month preceding, at which time they divided equally between them the excess of cash receipts over the disbursements, and that the last of such settlements was of the business done in the month of December, 1886. Also, of an allegation of the purchase of six cows, by appellant of respondent, for \$180, and that he had not paid for them, and that the appellant was in possession of one Buckeye mower of the value of \$75, and potatoes of the value of \$250, all being the property of the said copartnership; also, that the firm dug a well on appellant's farm, and furnished appliances for drawing water therefrom at the cost of \$80, and that appellant refused to pay said money, or account for said partnership property retained by him, and claimed as relief an accounting of said partnership business since December 31, 1886.

No reply to the answer was filed, but a stipulation was entered into by and between their attorneys in their behalf to stand in the place of such reply, and of which the following is a copy: "(1) Admitting that at the expiration of any partnership that existed between the parties, the plaintiff purchased of defendant six cows for the sum of \$180, and has paid no part of the said sum. (2) Admitting that plaintiff has in his possession one mower, the property of plaintiff and defendant, of the value of \$60. (3) Admitting that plaintiff has possession of a well that cost, with the appliances, \$80, one half of which sum was paid by each party. (4) Denying specifically each and every other allegation contained in the answer of defendant herein."

The case was referred to a referee to take the testimony and report it to the court, together with his findings of fact and conclusions of law thereon.

The main controversy in the testimony was, whether the use of the farm was to be included in the partnership business. The appellant seemed inclined to concede that the use of a part of the

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farm was to be included, such as the barn, the use of the house and fixtures, the pasture, and he admits that he consented to the raising of grain thereon for the stock, but claims allowance for the hay that was raised and fed to the animals, and emphatically denies that the partnership included the potatoes. There was also a controversy about a horse that had been bought, worth \$25. I am inclined to think, however, from the testimony, that the horse belonged to the appellant, at least, half of it. The respondent testified that "he bought out a half interest in Rankin's business for \$200, and was to have the other half interest at the same price whenever he wanted it; that he went back to Rankin in about ten days and told him that he would give him \$200 for the other half of the business and the mare thrown in; that Mr. Foster told him that he should buy the other half interest for him; that he told Mr. Foster that he could buy it for \$200; that that was the agreement when he bought the first half, to pay \$200 without the mare for the other half of the business. Mr. Foster told respondent to buy it for him, and he bought it and paid Rankin \$200; that he got the mare also; the mare had no connection with the business." But the mare did have connection with the business; respondent having been employed by Foster, the appellant, to buy out the half interest from Rankin, appellant was entitled to the benefit of his bargain. The respondent had no right to speculate in that way when acting for appellant. The respondent should be charged \$12.50 on account of that transaction.

The referee found that the contract set out in the complaint was entered into by mutual mistake of the parties thereto, and that it was erroneous in that it did not provide, as was the intention of the parties, that the partnership was formed for the purpose of carrying on a farming business, as well as a milk business; that the appellant was to put in his share of the capital stock, among other things, the use of his said farm. He also found that the respondent, since the first day of January, 1887, had collected of the moneys due said firm the sum of \$258.55, and paid out on account thereof \$156.70, leaving a balance in his hands due the firm of \$101.85. That the appellant purchased

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the six cows, as admitted in the stipulation, which constituted the reply, for \$180, for which he had not paid respondent. That appellant sold of the property belonging to the partnership 90 sacks of potatoes, for which he received \$123.16. Found that the expenses of digging the well, etc., were \$80, and that he retained the mowing machine which was \$60, and was indebted to the firm in that sum on account thereof; and, as conclusions of law, that the respondent was entitled to a decree reforming the contract of copartnership in accordance with the findings of fact, and for the sum of \$260. This was made up, I suppose, by charging the appellant:—

The price of the cows.....	\$180 00
One half of the money for the potatoes.....	61 58
One half of the expense of the well.....	40 00
One half value of the mower.....	30 00

Amounting to.....	\$311 58
And crediting him with one half the \$101.85 collected. viz.	50 92

Leaving.....	\$260 66
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There are two questions in the case to be considered: *First*, had the respondent a legal right, under the allegations and proofs, to have the contract set out in the complaint reformed; and *second*, if reformed, what changes was the respondent entitled to have made therein?

Pleading a mistake in contract. The pleader did not, as I consider, properly allege the facts so as to entitle a party to have, in a strict sense, the contract reformed. He should have alleged more than that it was erroneous in certain particulars, and for what purpose the partnership was formed. He would ordinarily have to set out the terms of the contract as the parties made it; what they each undertook and agreed to do; and show why its terms happened to be left out when it was attempted to be reduced to writing, or how terms not agreed upon came to be inserted.

This case stands, however, upon somewhat different principles. The relief sought here was to supply what the parties through inadvertence and mistake had omitted.

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Reforming a written contract on the grounds of mistake is the exercise of the ordinary jurisdiction of a court of equity. That court, however, has always required, in all cases coming under that head, strong and convincing proof of the mistake. It never undertakes to make contracts for parties; it leaves them to do that for themselves; but where it is shown that there has been a mistake, that, if not corrected, it would operate to the prejudice of a party, and that it did not occur through the party's carelessness or negligence, it will correct it.

The parties having deliberately signed an instrument in writing, setting forth what they have agreed upon, cannot, however, expect a court to find that their agreement was different from what they have so declared it to be, without clear, cogent proof that such is the fact, and a reasonable explanation as to how they failed in not having the writing express the true agreement. If this case depended upon the oral proofs alone, I should be of the opinion that the respondent had not shown himself entitled to have the written agreement reformed. But an inspection of the agreement shows it to be incomplete. It does not show what the appellant was to do in carrying on the partnership business, or that he was to do anything except what might be inferred therefrom; and the circumstances under which the parties were situated, and their mode of dealing, afford strong proof that the farm referred to was to be used as an incident of the business they engaged in. I do not think that the evidence in the case warrants the court in finding that the parties agreed to carry on the farming business; their business was, I am satisfied, confined to the milk or dairy business; but that they were to have the benefit of the appellant's farm, in order to carry on the milk or dairy business, is very evident. I have no doubt but that was the understanding between them; they were to use the barn, the pasture land, the plow land for grain, and the meadows. The respondent was to occupy a part of the house, have the benefit of the fruit and garden beyond question; all their acts indicate that. The cows were kept there; the well was dug to supply water required in carrying on the business; the meadows were sown with plaster; a mower was procured and the plow land

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cultivated at their joint expense; but that the absolute use of the farm was to belong to the partnership is not established by the proof. All that was raised upon the farm not necessary to the conduct of the dairy business, under my view of the evidence, belonged to the appellant individually. If it had been intended that farming was to constitute a principal business of the partnership, it would have been stated, no doubt, in such a way to the scrivener that he would have included it in the writings; but considered only as incidental to the dairy business, it was probably not mentioned so distinctly as to enable him to remember it. He remembered the dairy business, and, probably after he had expressed the terms that it was to be carried on, concluded he had earned the half dollar the appellant paid him for doing the writing. He was engaged in the real estate business, and no doubt was disturbed frequently while drawing up the articles. It would have been better for both parties if they had left their matter in parol. Their going to an inexperienced person to have a contract of that character drawn could hardly fail to get them into difficulty.

I think the decree upon the accounting should be changed by adding to the appellant's credit \$12.50, on account of the mare referred to, and by discharging the item of \$61.58 on account of the potatoes; I think the potatoes belonged to the general farming business, and were not included in the dairy matter. This will reduce the amount due from appellant to \$186.58, instead of \$260.66. The decree appealed from will therefore be modified in that particular; in all other respects will be affirmed. Neither party is entitled to cost of appeal, but each to pay one half of the clerk's fees of this court.

Argument for Respondents.

[Filed November 7, 1887.]

S. LILLIENTHAL & CO. APPELLANTS, v. A. P. HOTALING CO. ET AL., RESPONDENTS.

15	371
31	53
31	180
15	371
28	314
15	371
42	486
42	611

REPLY—WHAT CANNOT BE PLEADED IN.—A plaintiff cannot plead in his reply matter which would be cause for an original action.

JUDGMENT—CREDITORS' RIGHTS OF.—Respondents and appellants having obtained separate judgments against one V. C., the appellants applied to the respondents, whose judgments were prior to that of appellants, to unite with them in a suit to set aside a prior judgment of one H., against said V. C., which the respondents refused to do; but entered into an agreement with H., whereby they received a note from him and gave him a receipt for the same, specifying that it was given to pay their judgments, and that if the property was sold under execution for cash, they should receive the same and surrender up the note; but if H. bid in the property they were to hold the note in lieu of their judgments. The appellants then began suits against H. and the respondents to have his judgment declared fraudulent, and to obtain priority over the judgments of respondents. The property of V. C. was sufficient to satisfy the judgment of H. and the respondents. Upon trial the judgment of H. was found to be fraudulent. *Held*, (1) That if the H. judgment was fraudulent, the other respondents, having a subsequent lien, did not lose their priority of lien in consequence of their refusal to unite with the appellants in such suit, nor by endeavoring to obtain payment thereof through the agreement with H. (2) That the note given them could not be considered as having paid their judgments. (3) That the fact that they refused to join with the appellant in a suit to set aside the H. judgment, and entered into the arrangement with H., did not taint their judgments with fraud. (4) That this was not a case where the appellants would be entitled to a priority of lien over the respondents, as in a case of discovery of equitable assets.

APPEAL from Multnomah County. Affirmed.

Williams, Ach & Wood, for Appellants.

The acts of the respondents who had obtained judgments were subsequently fraudulent, and the fraud tainted the whole proceeding. (*Gibbs v. Neeley*, 7 Watts, 307; *Serfoss v. Fisher*, 10 Pa. St. 184, 185.)

The judgments of respondents were paid by the note. (Free-man on Judgments, §§ 463-468.)

Alex. Bernstein, for Respondents.

The reply introduces a new cause of action, and the demurrer thereto should have been sustained. (*Durbin v. Fisk*, 16 Ohio St. 533; *School District v. Caldwell*, 16 Neb. 68; *Bernheimer v.*

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Marshall, 2 Minn. 78; *Webb v. Bidwell*, 15 Minn. 279; *Hatch v. Coddington*, 32 Minn. 92.)

A creditor whose rights are not injured by a debtor's transfer of property cannot complain that the transfer was fraudulent. (*Barnet v. Knight*, 7 Colo. 365.)

Unless the judgments therefor are fraudulent and void at their inception, it matters not what disposition was made of them. (*Freeman on Judgments*, § 512; *Mayer v. Woodall*, 35 Tex. 687; *Stone v. Towne*, 91 U. S. 341.)

THAYER, J.—It appears from the facts in the case that on the twentieth day of October, 1886, one Fanny A. Holder commenced an action in said Circuit Court against one Vincent Caravita, upon three promissory notes executed to her by Caravita. And that on the twenty-second day of October, 1886, she recovered a judgment therein by confession against Caravita for the sum of \$3,232, with interest thereon at the rate of ten per cent per annum, from said twentieth day of October, 1886, \$375 attorney's fees, and the costs and disbursements of the action. That on the same day of the rendition of said judgment execution was issued thereon, and a levy made, by virtue thereof, upon Caravita's property, consisting principally of a stock of liquors and cigars in the city of Portland. That on said twenty-second day of October, the respondents, the A. P. Hotaling Co., a private corporation, G. Ginnochio & Co., Frappoli, Berges & Co., and E. Goslinsky & Co., severally commenced actions in said Circuit Court against Caravita, and in each of said actions an attachment was issued and levied upon said property on the day of the commencement of said actions, but subsequent to the levy of the Holder execution. That the appellant, also, on said twenty-second day of October, commenced an action against Caravita, in which an attachment was issued and levied upon said property, but subsequent to the levy of the said execution and of the attachments of the respondents. The several claims upon which the actions in favor of said respondents and appellants were commenced appear to have been valid claims arising out of the sale of articles made by them respectively to the said

Caravita. Judgments were duly recovered upon each, upon the third day of November, 1886, and an order of sale of the attached property taken in each of the cases, and an execution was duly issued upon each of said judgments and levied upon the said property. The judgments in favor of the respondents are comparatively small, aggregating only \$1,015.25, while that of the appellants amounted to \$6,606.16. The property was entirely insufficient to satisfy all the claims; that it amounted in value to less than \$4,000.

The appellants, evidently, were convinced that Mrs. Holder's claim was a sham, and that her judgment recovered thereon was fraudulent, and requested the said respondents to unite with them in a suit to set it aside, which they refused to do. It appears that the said respondents' claims were placed in the hands of Alexander Bernstein, Esq., an attorney at law, and their attorney herein, for collection, and that Mrs. Holder's pretended claim was represented by J. M. Bower, Esq., also another attorney at law, who conducted the proceedings for Mrs. Holder, as her attorney in commencing the action, and in obtaining the judgment in her favor against Caravita. The property was advertised for sale upon the Holder execution for the ninth day of November, 1886. It appears that on or about the third day of November, 1886, and after the appellants had requested said respondents to unite with them in a suit to set aside the Holder judgment, Mr. Bernstein called upon Mr. Bower in regard to the business, and the two went to Holder's place of business, where they met Mrs. Holder's husband, Joseph A. Holder, and made arrangements that the amount of the said respondents' judgments, and of the said Holder's judgment, should be bid for the property at the sale thereof, and that if any one bid more than that they would let such bidder take the property, and the said judgments would be paid out of the proceeds. If not, Bernstein was to bid in the property for the amount mentioned, and transfer it to said Joseph A. Holder, provided he would give a note for the amount of the said respondents' claims, and secure it by a chattel mortgage on the stock and fixtures. That in pursuance of that arrangement an instrument in writing was

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drawn up by Mr. Bower, and signed by Mr. Bernstein, of which the following is a copy:—

“PORTLAND, OREGON, 9th November, 1886.

“Received of Joseph Holder and Fanny A. Holder a note of even date herewith for \$1,031, made and executed by said Joseph Holder and Fanny A. Holder, payable to my order at the Portland National Bank, and payable four months after date. Said note is given to pay the following claims and judgments, exclusive of costs and expenses taxed:—

A. P. Hotaling Co. v. Caravita.....	\$ 175 25
Ginnocchio & Co. v. Same.....	215 75
Frappoli, Berges & Co. v. Same.....	188. 00
E. Goslinsky & Co. v. Same.....	452 00

\$1,031 00

“And in case the sale of the stock of V. Caravita is sold for cash, I agree to deliver the said Holders their note, and they to pay cash the full amount thereof. And in case I become the purchaser by giving to the sheriff receipts for judgments against said Caravita, I agree to deliver the same to said Holders forthwith upon said Holders giving a chattel mortgage on the said stock, securing said note and such other claims as may rank equally with said note.

“ALEX. BERNSTEIN, Attorney at Law.”

On the fifth day of November, 1886, the appellants commenced their suit against the said Caravita, Fanny A. Holder, the said respondents, and the Napa Valley Wine Co. and James Zanello. The last-named defendants, the Napa Valley Wine Co. and Zanello, were impleaded on account of some subsequent interest or claim they had upon the property, but they took no part in the litigation. The object and purpose of the appellants' suit was to set aside and annul the Holder judgment, and restrain its enforcement, and decree their lien by virtue of their attachment to be a prior lien to any and all liens of the other creditors of the said Caravita, and that their judgment be first satisfied out of the proceeds of the sale of the attached property. There is

no allegation in the complaint against the legality of the said respondents' said judgments, or which is calculated in anywise to impeach them. They allege, however, that they had requested said respondents to join with them as plaintiffs in the suit, but that the former had refused to do so, and, wherefore, they were made defendants therein.

An answer was filed on the part of Fanny A. Holder, by Messrs. McDougall & Bower, and Alexander Bernstein, as her attorneys, also upon the part of the said respondents by said Alexander Bernstein, their attorney. Said answers were filed separately. The answer of Mrs. Holder contains denials of knowledge or information sufficient to form a belief as to the appellants' claim, and of the proceedings alleged in the complaint to have been had thereon, and denies positively that her action against Caravita was not instituted against him collusively or fraudulently, or with the intent to hinder, delay, or defraud creditors of the said Caravita, or any one else, and the answer of the said respondents contains similar denials of said claim, and the proceedings had thereon; also the same character of denials of the alleged collusion and fraud, and affirmative allegations as to the issuance of their attachments and their priority to that of appellants.

The Circuit Court granted an order in the suit restraining further proceedings upon the Holder judgment during the pendency of the suit, which the said respondents, by their attorney, said Alexander Bernstein, subsequently and on the ninth day of November, 1886, moved the court to modify. The said motion was founded on the pleadings and proceedings in the suit, and was supported by certain affidavits made on behalf of said respondents. The modifications sought, and which the said affidavits were made to obtain, were to the effect that the sheriff might be permitted to accept the bids of the judgment creditors on their judgments prior to the appellants' judgment, or that, upon the plaintiffs in the suit filing an undertaking, an injunction order of the court issue, according to law and the regular practice of the court, restraining the sheriff from proceeding with the sale under the execution of the said Fanny A. Holder, or of

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the execution of any of the other defendants in the suit, until the issues in the suit were heard and determined.

The appellants, some time after said respondents' answer was filed, filed a reply thereto, in which they denied the priority of the respondents' attachments, and set up affirmatively that said respondents had been fully paid their claims; also, that they and the Holders had conspired and confederated together for the purpose of defrauding the creditors of Caravita, and appellants especially, and had agreed to place all possible obstacles in the way to prevent the collection of appellants' said judgment against Caravita; and that since the commencement of the suit herein, and before the filing of their answer herein, the said respondents, in pursuance of said confederation, collusion, and alleged agreement, have received from the said Fanny A. Holder and Joseph A. Holder a promissory note in full of the said claims against said Caravita, and did agree at the time of the receipt thereof by them, to hinder and delay the appellants in the collection of their demands.

The case was referred to a referee to take and report the evidence, and his findings of fact thereon, and conclusions of law. The referee, after taking the testimony, found that the said three promissory notes executed by Caravita to the said Fanny A. Holder, and upon which the said judgment was recovered, were without consideration, and were given, and the judgment obtained thereon, with intent to hinder, delay, and defraud the creditors of said Caravita, and that said judgment was wholly fraudulent and void. He also found that the judgments of the said respondents were valid judgments; that none of them had been paid; that neither of said respondents had conspired or confederated to defraud any of Caravita's creditors, nor been guilty of any fraud, and that each of them had a lien on said attached property prior in time to any lien thereon of appellants; which report having been confirmed by the said Circuit Court, the decree appealed from was entered.

The appellants' counsel contend that the refusal of said respondents to unite with them in the suit to set aside the judgment in favor of Fanny A. Holder against Caravita, the

arrangement entered into between said respondents and Joseph A. Holder, through their respective attorneys, as before mentioned, and attempted modification of the order staying proceedings, are evidence of a conspiracy between the said respondents and the Holders to defraud the appellants; that it was an attempt to use said judgments for a fraudulent purpose, and to delay the appellants in the collection of their claim; that the execution by Joseph A. and Fanny A. Holder of their promissory note to said Alexander Bernstein, as shown in the writing signed by him, operated as a payment of the respondents' judgments. Said counsel also claim that the appellants are entitled to have their judgment preferred to that of the said respondents for having instituted the suit, uncovered the fraud of Caravita and Mrs. Holder, and removed an obstruction which stood in the way of the collection of any of the judgments.

It is claimed by the respondents' counsel that the appellants cannot avail themselves of the benefit of the matters charged in the reply, as they were not alleged in the complaint, and I think there is much force in the claim. The complaint, impliedly, at least, admits the validity of the judgments referred to, and makes no attack whatever upon their verity. A plaintiff in an action or suit must recover, if at all, upon his complaint. The facts constituting his cause of action or suit must there be stated; a reply can serve him no purpose except to controvert or avoid new matters set up in the answer. The old rule, that every pleading on the part of the plaintiff, subsequent to the declaration, and on the part of the defendant, subsequent to the plea, could only be used to fortify, respectively, the declaration and plea, is still in force, in principle, and it matters not what may be alleged in a reply; if the complaint fails to state a cause of suit, the plaintiff will not be entitled to any relief.

The appellants' claim to priority of lien on account of their having commenced and prosecuted their suit is based upon the rules of law, which obtain where equitable assets are discovered by suit in the nature of a creditor's bill, and made applicable to the satisfaction of a judgment where they could not have been reached by the ordinary means provided by law.

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This is not that kind of case. Here an equitable obstruction has been interposed in the way of the appellants' and respondents' collection of their claims, which had become a lien by law upon the property, having priority in right by reason of their priority in time. As between the appellants and said respondents, the latter's judgments were first in time, and they acquired a legal lien by virtue of the levy of their attachments. The levy of the Holder execution was prior to both, and the appellants had more interest in getting it out of the way than the respondents had. The latter may in fact have had no interest in having the Holder judgment set aside. They certainly did not, if the property would bring a sufficient sum at the sale to pay Holder's judgment and their own. I do not think this is a case where the appellants can gain a priority as claimed. The rule alluded to never extended to the displacement of a legal existing lien. (*McKinney v. Farmers' National Bank*, 104 Ill. 180.) It only gave the plaintiff the first right on account of his superior vigilance, when in all other respects the parties stood equal. The appellants' claim to priority upon that ground must therefore be denied, and if the rules which govern pleadings in the respect before referred to are enforced, it will dispose of their claim upon the other ground.

Independent of that, however, I cannot see how said claim can be maintained. The said Caravita, who had been engaged in the liquor and cigar business, failed, leaving insufficient assets to liquidate his liabilities, and a race of diligence between his creditors, of course, was commenced. He had executed the fraudulent notes upon which action was commenced before his creditors had notice of his failure, but they were not tardy when they ascertained the fact of his having failed, and doubtless looked only to the collection of their respective claims. The claims of the said respondents were small, and they were justified in endeavoring to secure them with as little expense as possible, and their attorney, Mr. Bernstein, evidently thought that the better and less expensive course would be to make the arrangement he did with Mr. Bower, to have the property sell for enough to pay the claims he represented in excess of the Holder

judgment. He received the note of Holder and his wife for the amount of said claims, and agreed to bid the amount of his clients' judgments and the Holder judgment for the property at the sale, and if it were struck off to him to let Holder have it, and take a mortgage on it to secure the note; and I have no doubt but that the said respondents were anxious that this plan should be carried out.

If, however, such arrangement was calculated to defeat or delay the appellants in the collection of their claim, and was entered into for that purpose, it would be void. But whether the court would in that case have the power to destroy or postpone the said respondents' liens upon the property, under and by virtue of the levy of their attachments, I do not undertake to determine, as I do not believe the testimony and proofs warrant such conclusion. In the first place, the arrangement could not affect the appellants' rights, did not, in any way, impair their remedy in the collection of their claims; and in the second place, the respondents had no apparent motive in depriving the appellants of any legal right to which they were entitled, and proof of their entering into the arrangement they did through their attorney did not establish the existence of such motive on their part. Nor did the execution of the note by Holder and wife to Bernstein, for the amount of the respondents' judgments, constitute a payment of the judgments. It was a conditional affair, and was not to have effect unless the property was sold and bid in by Bernstein, which condition never happened. It is insisted that the agreement to turn the property over to Joseph A. Holder, in case Bernstein bid it off, was in fraud of appellants' rights; but I do not understand why Bernstein would not have had the right to do with it as he pleased if he bought it, nor how the appellants would have had any further interest in the property after it was sold on the execution. The respondents may have had information that the Holder claim was fraudulent, but if they had, they were not required to raise the question. They had the right to waive if they saw fit.

I have examined the several matters complained of by the appellants, and am not able to discover any grounds for chang-

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ing the decree appealed from. The brief filed herein on their behalf exhibits an intensity of feeling upon the part of counsel who prepared the same, and perhaps the circumstances of the case were such as to have inspired it; but the facts fail to show that a fraudulent use was made of the respondents' said judgments, or that there was any conspiracy between the respondents, or those who represented them, to hinder, delay, or defraud the said appellants, or that they were defrauded in any particular.

The decree appealed from must therefore be affirmed.

[Filed November 9, 1887.]

W. A. SCOGGIN, ADM'R, APPELLANT, v. CHRISTOPHER
SCHLOATH ET AL., RESPONDENTS.

FRAUDULENT CONVEYANCE—INADEQUACY OF CONSIDERATION.—When land of the value of two thousand dollars was conveyed for the consideration of one hundred dollars, *held*, that as against existing creditors, such deed was constructively fraudulent.

CONSIDERATION IN DEED—WHEN MONEYED CONSIDERATION CANNOT BE SHOWN.—When the consideration in a deed is expressed to be natural love and affection, or marriage, or the like, it is not competent for the purpose of supporting the deed to prove that the consideration was a moneyed one.

SAME—DIFFERENT IN KIND.—A consideration different in kind from that expressed in a deed cannot be proven; but when the consideration expressed is a moneyed one, for the purpose of rebutting the presumption of fraud, a larger or different moneyed consideration may be proven.

FRAUD—PROOF OF.—Circumstances considered which tend to prove the deed was fraudulent.

APPEAL from Multnomah County. Reversed.

Tanner & Carey, and *Zera Snow*, for Appellant.

Coples & Mulkey, for Respondents.

STRAHAN, J.—In this case the appellant sues as administrator of the estate of Thomas Sherlock, deceased. The object of this suit is to set aside, and to have declared void for fraud, a certain deed of conveyance made by Thomas Sherlock in his lifetime to the respondent Dora Schloath. This suit was commenced and is prosecuted by the order of the County Court of Multnomah

County, Oregon, made pursuant to sections 1167 and 1168 of Hill's Code. The complaint alleges, among other things, that plaintiff is administrator of said estate, and that claims aggregating something near one thousand dollars have been duly presented and allowed against said estate, and that there are no available assets applicable to the payment of said claims, and the costs and expenses of administration; that Thomas Sherlock in his lifetime was seised of one hundred and sixty acres of land, situated on Sauvie's Island, in the State of Oregon; that he died on the twelfth day of April, 1886; that on the fifteenth day of July, 1885, he executed to the defendant Dora Schloath a deed conveying to her said land, for the consideration of one hundred dollars. The complaint further shows that said Sherlock was, during the last two years of his life, addicted to the excessive use of intoxicating liquors, and had become weak in mind and body, and dependent entirely on the Schloaths for care and attention, and for advice as to the management of his property; that the Schloaths, taking advantage of his situation and condition, by the exercise of undue influence, and with the intent to hinder, delay, and defraud the creditors of said Sherlock, induced, persuaded, and compelled him to execute the deed in question for the nominal consideration of one hundred dollars, which in fact was never paid; and that said property was of the value of two thousand five hundred dollars.

The answer denies the allegation of the complaint, and then alleges that on or about the fifteenth day of June, 1885, the said Thomas Sherlock and Dora Schloath had an accounting and settlement of all their affairs and business transactions, upon which said accounting and settlement it was found and ascertained and mutually agreed upon that said Thomas Sherlock was justly and truly indebted to said Dora Schloath in the full sum of two thousand dollars for board and lodging, and for money loaned and furnished said Sherlock, and that, in consideration of said sum of two thousand dollars, and the further sum of one hundred dollars then and there paid him, the said Sherlock made and delivered the deed in question. The reply presents an issue as to the new matter in the answer.

An examination of the evidence leads us to the conclusion that Thomas Sherlock drank to great excess during the last two or three years of his life, and that for some time before his death his physical as well as his mental organization was greatly impaired, and that his mind had become so weak that he had no power to resist the importunities of those by whom he was surrounded. But although much evidence was given on this branch of the case, it is unnecessary to consider it in this place, for the reason that there is another question presented by this record which is fatal to the validity of the deed in question. The consideration expressed in the deed is one hundred dollars. The property conveyed is admitted to be worth two thousand dollars by the defendants, and its real value, according to the evidence, is probably somewhat greater. The debts which the plaintiff represents were in existence at the time of the conveyance. Therefore, as against existing creditors, the deed was constructively fraudulent.

The consideration must be regarded as nominal. Counsel for the defendant seem to realize that this result must follow, unless they can support the deed by showing that there was in fact a further and additional consideration to that expressed in the deed, and which is sufficient, if shown to be *bona fide*. The proof offered tends to prove that about the time of the execution of the deed, Dora Schloath and Thomas Sherlock had a settlement, and that in that settlement Sherlock acknowledged himself to be indebted to her in the sum of nearly four thousand dollars, mainly for board and lodging, and for a few items of money loaned; that this was all the property Sherlock had, and that Mrs. Schloath agreed to take it at two thousand dollars, in full payment and satisfaction of her claim. The evidence on this point, however, does not seem satisfactory, for reasons to be more fully stated hereafter. It may be observed now, however, that no reason is shown why this account was not paid sooner. Sherlock was in business, and appears to have had money and property, and it does not appear that he was unable to pay it. Furthermore, at the time of this alleged settlement, Sherlock was close up to the border line of imbecility, brought about, as

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appears, by the excessive use of strong drink. This circumstance, which, taken alone, is not enough to overthrow his deliberate deed, requires us to carefully examine the facts now offered to support it. But it is claimed on the part of the appellant that if this deed is impeached for fraud, actual or constructive, it is not competent to support it by proving a consideration other or different from that expressed in the deed, and this view seems to be supported by respectable authority. (*Murphy v. Bank of Mobile*, 16 Ala. 90; *Patten v. Gracie*, 68 Ala. 90; *Houston v. Blackman*, 66 Ala. 559; *Galbreath v. Cook*, 30 Ark. 417; *Carmack v. Lovet*, 44 Ark. 180; *Glenn v. McNeal*, 3 Md. Ch. 349; *Ellinger v. Crowl*, 17 Md. 361.) These authorities, it must be admitted, tend very much to support the plaintiff's contention. But after a careful consideration of the authorities, I am inclined to think the better reason as well as authority is the other way. The better rule appears to be that if the consideration expressed in the deed is natural love and affection, it cannot be shown to have been executed for a valuable consideration; or if voluntary, or on consideration of marriage and the like, it cannot be shown that the consideration was a moneyed one. This would be proving by parol that the consideration was different *in kind* from that expressed in the deed, and upon well-considered authority, is not allowable. But where the consideration is a moneyed consideration, there appears to be no reason for rejecting evidence tending to prove that a larger or additional sum was in fact paid. (*Cunningham v. Duye*, 23 Md. 219; *Credle v. Carrawan*, 64 N. C. 422; *McKinister v. Babcock*, 26 N. Y. 378; *Fellows v. Emperor*, 13 Barb. 92; *Tyler v. Carlton*, 7 Me. 175; *Howell v. Elliott*, 1 Dev. 76; *Bank of the United States v. Brown*, 2 Hill Eq. 426; *Glenn v. McNeal*, 3 Md. Ch. 349; *Mayfield v. Kilgom*, 21 Md. 240; *Hindee's Lessee v. Longworth*, 11 Wheat. 199.) Returning now to the evidence offered of an additional consideration to that expressed in the deed, we are prepared to consider it purely as a question of fact, and viewing it in the light of all that is offered to support it, and of the surrounding circumstances, there seems to be much reason for holding the evidence insufficient. No items of account were kept against Sherlock. The

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claim extends over a period of fifteen years. The parties had many financial transactions and settlements of their affairs during that time. In the absence of any evidence whatever as to what items were included in such settlements, it is to be presumed that every item of account then existing between the parties was included. (*Matasce v. Hughes*, 7 Or. 39.) In addition, then, to the evidence necessary to establish the account of the defendants, they must also overthrow this presumption by the introduction of evidence. And upon this point the record is entirely silent. But this is not all; the defendants are unable to give connected, straightforward, consistent statements of their dealings with Sherlock during the time covered by this account, and yet all the matters in dispute appear to be peculiarly within their knowledge. The entire course of business and dealing between the parties and Sherlock, it must be admitted, are against this claim. No charges were made against him or accounts kept of the items now claimed; no one was present at the alleged settlement but the defendants and Sherlock, and his condition is shown to have been such that, to say the least, it is very doubtful if he fully comprehended or understood what was said or done. The deed itself was executed in Schloath's Saloon; and one of the witnesses was his bar-keeper, and it was written at his suggestion, and by a scrivener employed by Schloath for that purpose.

Upon the whole case there is such a cloud of doubt and uncertainty hanging around the transaction, and the evidence offered of this pre-existing debt is so unsatisfactory, that we must hold the deed in question to be constructively fraudulent as to the existing creditors of Sherlock. It will therefore be set aside as to these creditors, the property will be decreed to be sold, and out of the proceeds Dora Schloath will be first paid one hundred dollars, with interest at ten per cent per annum from the fifteenth day of July, 1885, the date of the deed, and the residue will be turned over to the plaintiff, to be applied in due course of administration.

Points decided.

[Filed November 9, 1887.]

**MARY J. WEBER, RESPONDENT, v. E. S. ROTHCHILD,
ET AL., APPELLANTS.**

FRAUDULENT CONVEYANCE—AGREEMENT TO RECONVEY.—Where at the time of the execution of a deed for the expressed consideration of two thousand five hundred dollars, an agreement is made to reconvey in a year for the same amount, and the property was of the value of six thousand dollars, such deed and agreement create a trust in favor of the grantor, and is as against the grantor's wife, who is about to prosecute a suit for a divorce and alimony, fraudulent.

PURCHASER FROM FRAUDULENT GRANTOR—HOW PROTECTED.—A purchaser from a fraudulent grantor can only protect himself when the transaction is assailed for fraud, by alleging and proving that he paid a valuable consideration for the property, giving the facts; that at the time of such payment he had no notice of the outstanding equity or fraudulent intent, as the case may be, and that he acted in good faith.

CODE—PLEADING UNDER—EQUITY PLEADING.—The Code has abolished forms; it has not destroyed substance. Therefore a plea of *bona fide* purchaser, for value and without notice, must be as full under the Code as under the former system of equity pleading.

BONA FIDE PURCHASER—BURDEN OF PROOF.—A party pleading that he is a *bona fide* purchaser for value and without notice has the burden of proof on that issue. It is an affirmative defense.

BURDEN OF PROOF.—When a fact is more particularly within the knowledge of one party than the other, the burden of proving such fact is on such party.

PRACTICE—ANSWER TO ORIGINAL COMPLAINT—WHEN TREATED AS ANSWER TO AMENDED COMPLAINT.—Upon the trial and after the evidence was all in the plaintiff amended her complaint touching causes of divorce so as to conform the pleadings to the facts proved, and the defendant E. S. R. did not amend his answer nor apply to the court for leave to do so, and his answer was treated as an answer to the amended complaint in the court below and in this court. *Held*, that E. S. R. not having been prejudiced in any manner could not be heard to complain in this court for the first time that he had not answered said amended complaint.

FRAUDULENT CONVEYANCE.—*Held*, under the particular facts disclosed by the evidence in this case, that the defendant W., at the time he conveyed the property in controversy, intended to hinder, delay, and defraud the plaintiff in the prosecution of her contemplated suit for a divorce, and for a recovery of alimony and one third of Weber's land.

FRAUDULENT CONVEYANCE—ANSWER—BONA FIDE PURCHASER.—To constitute a good answer that defendant is a *bona fide* purchaser for value and without notice, it must be alleged: (1) Seisin of the grantor in fee, or a pretended seisin and possession at the time of the conveyance, if it pretended to confer immediate possession. (2) A conveyance and not articles merely. (3) The consideration and actual payment of the same.

REPLY UNNECESSARY, WHEN.—If the answer is wholly lacking in substance as to these essentials no reply is necessary.

ONUS PROBANDI—WHEN UPON THE DEFENDANT.—When it appears that the grantor in a deed intended to defraud his wife out of alimony in a suit for a divorce which she was about to commence, and that he made the deed for that purpose to E. S. R. *held*, that E. S. R. can only protect his title by alleging and proving

15	386
16	163
21	23
21	386
15*	630
17*	866
26*	863
28*	73

15	385
27	115
15	385
41	477

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that he is a *bona fide* purchaser for value and without notice; *held*, also, that the facts of the payment of value, and when paid, as well as the want of notice, are facts lying peculiarly within the knowledge of the defendant E. S. B., and that for that reason the obligation of proof lies with him.

APPEAL from Multnomah County.

H. T. Bingham, and *Cornelius Taylor*, for Respondent.

Emmons & Emmons, and *Joseph Simon*, for Appellants.

STRAHAN, J. — The objects of this suit were, *first*, to obtain a dissolution of the marriage existing between plaintiff and the defendant Emil Weber, the care and custody of the children born of said marriage, alimony, and one third of the real property of the defendant Weber; and *second*, to set aside and annul, as fraudulent, a certain deed made by the defendant Emil Weber to the appellant Rothchild, of certain property in Multnomah County. The deed included the house and lot in the city of Portland, where Weber and his wife had resided for a number of years, the furniture therein, and a piece of farm land in Multnomah County. The plaintiff obtained a decree in the court below in accordance with the prayer of her complaint, and for five thousand dollars alimony, and the conveyance to Rothchild was set aside as fraudulent. From so much of the decree as annuls this deed Rothchild has appealed to this court, and the only questions presented here for our consideration are those between the plaintiff and Rothchild.

After the evidence had all been taken in the court below, and before final decree, the court allowed the complaint to be amended so as to conform the pleading to the facts proved. This amended pleading does not affirmatively appear from the record to have been served on Rothchild, nor was it necessary, nor did he file an answer to the same. The new matter inserted in the amended pleading related entirely to the causes of divorce relied upon by the plaintiff, and did not affect the transaction between the defendants as to the property. In addition to this, Rothchild appeared and filed exceptions to the referee's report, and so far as appears, his answer to the first amended complaint must have been treated as an answer to the second amended com-

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plaint, and it has been so treated in this court. It has not been suggested that there is anything in the plaintiff's second amended complaint that is not as fully met by this appellant's answer to the first amended complaint as he desired to meet it, and we cannot see that any injury will result to any party by so treating it. In addition to this, no objection appears to have been made in any form in the court below to the state of the pleadings, but it is made here for the first time. We will, therefore, for the purposes of this case, treat the answer of Rothchild as an answer to the plaintiff's second amended complaint.

The complaint alleges substantially that on the third day of November, 1886, the defendant Weber left his place of abode in Portland, Oregon, and absconded and secreted himself at Denver, Colorado, for the purpose of avoiding the service of a summons in this cause; that he then had in money about ten thousand dollars, which he withdrew from Ladd & Tilton's bank in the city of Portland, and that just prior to his departure from this State he fraudulently assigned and transferred the real and personal property in controversy to the defendant Rothchild, for the purpose of hindering and delaying the plaintiff in the prosecution of her suit for divorce against Weber, and defeating any decree that might be made therein; that the consideration was inadequate, and that said Rothchild did not purchase said property in good faith, but accepted the conveyance thereof with an agreement that he would reconvey the same to Weber, or such person as he should designate, when thereto requested, and that said Rothchild holds the same in trust for Weber.

The separate answer of the appellant denies the fraud charged, and then alleges that on or about the third day of November, 1886, he purchased the property in controversy in good faith from the defendant Weber for and in consideration of the full sum of two thousand five hundred dollars, paid to said defendant Weber by this defendant. The answer then alleges that the only agreement which the defendant Rothchild made with Weber respecting said property was in writing, a copy of which is then set forth in the answer *in hæc verba*. This agreement bears even date with the deed, and in effect binds Rothchild in the

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penal sum of ten thousand dollars, to be void if he shall perform the conditions specified in said writing on his part to be performed. This agreement recites a money consideration of two thousand five hundred dollars, and it is then further stated in said writing, in substance, that a material part of the consideration for said conveyance "is the agreement on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of three thousand dollars, in gold coin of the United States, at any time within the period of one year from the date of this instrument, and to execute a good and sufficient deed of conveyance for all of the said real property conveying the *same title* and interest therein which I have received from said Emil Weber, upon such payment by him of said sum of three thousand dollars within said year; and whereas, I hereby agree to and with the said Emil Weber to execute said deed of conveyance, and reconvey all of said real property to him, upon the foregoing consideration." Said agreement further obligated said Rothchild to execute a deed of conveyance upon the payment of three thousand dollars within one year, conveying the title of all of said real property free from all encumbrances placed thereon, or suffered to be placed thereon by myself, or any grantees or assignees, to said Weber.

We do not care to recapitulate the facts touching the relations between Weber and his wife for some time prior to the second day of November, 1886, as they are disclosed by this record. It suffices to say that they furnished ample causes for a divorce, in favor of the plaintiff, and that these facts appeared to have come to the knowledge of the plaintiff not long prior to that time, and the defendant Weber also became aware about that time that his wife had acquired a knowledge of the facts upon which this suit is founded. The facts and circumstances leave no doubt in the mind of the court that the conveyance to Rothchild was made and designed by Weber to defeat the plaintiff in the recovery of any part of his (Weber's) property, or of alimony in her contemplated suit for a divorce. But it is argued by counsel that however fraudulent may have been his acts, Roth-

child must remain unaffected, unless the evidence proves that he had knowledge of such fraudulent intent, and participated in it. This is undoubtedly true, if Rothchild's acts were in good faith. But here two material facts appear, which, under all the circumstances, are of so cogent a character that they seem to call upon him for an explanation; in other words, that he should show that he paid a valuable consideration for the property, and that he did it without notice. The first is, that he made the contract set up in his answer, which, in the absence of any explanation, may well be regarded as creating a secret trust for Weber's own use and benefit; and the second is, that the only evidence offered on the subject tends to prove that the property in controversy was, at the time of the conveyance, of the value of from six thousand to eight thousand dollars. In addition to this the rental value and use of the property in Portland alone, as shown by Mr. Rothchild's affidavits filed in this cause, and used upon his motion to dissolve the injunction herein, is seventy-five dollars per month. Estimating the value of this property according to the income which it is capable of producing, it ought to be worth, at the very least, from six thousand to seven thousand five hundred dollars, which, added to the value of the farm, fifteen hundred dollars, also included in the deed, and we have an aggregate value of from eight thousand to nine thousand dollars. To sell this property for two thousand five hundred dollars was too great a sacrifice. The price alleged to have been paid was so entirely inadequate as to have put a prudent man on inquiry. But without placing the decision of this case on the ground suggested, there is another question presented which deserves attention. It is the purchaser for value and without notice from a fraudulent grantor who is protected under the statute. Does the defendant's answer show him to be such purchaser? To constitute a good defense, facts must be alleged showing that the purchaser paid a valuable consideration for the property; that at the time of the payment he had no notice of the outstanding equity, or, as in this case, of the fraudulent intent of his grantor, and that he acted in good faith. The same elements which were necessary to constitute a good plea in

bar in this class of cases under the former equity practice are necessary to make a good answer under the Code.

The Code has only abolished forms; it has not destroyed substance. The answer must therefore "aver that the person who conveyed or mortgaged to the defendant was seised in fee or pretended to be seised, and was in possession, if the conveyance purported to be an immediate transfer of the possession at the time when he executed the purchase or mortgage deed. It must aver a conveyance, and not articles merely; for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles. He must aver the consideration for, and the actual payment of it; a consideration secured to be paid is not sufficient." (Story on Equity Pleadings, § 805.) Further: "The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deed, and payment of the consideration; and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. . . . But the notice of fraud must also be denied generally, by way of averment in the plea; otherwise the fact of notice or of fraud will not be at issue. . . ." (Story on Equity Pleadings, § 806.)

Tested by these rules, the defendant's answer seems wholly wanting in substance to present the question sought to be litigated here. It is true, there is no reply to the defendant's answer sent up in this record; but the answer being wholly lacking in substance, it is conceived that no reply was actually necessary. The failure to reply only admits material facts that are well pleaded. It is the *bona fide* purchaser for value, in good faith and without notice, who is entitled to the protection of a court of equity, as against the person sought to be defrauded by the conveyance. And this brings us to the examination of a very important question in this case, and that is this: Is the plaintiff required to prove a negative, by showing that the defendant did not pay a valuable consideration, or, having shown the fraudulent intent and purpose of the grantor, may he stop and require the grantee to prove that he paid value, in order to protect his title? Here the defendant Rothchild has

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alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value without notice of this property, but he has offered no evidence whatever on those issues. The plea of a *bona fide* purchaser for value as here alleged is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it.

Another rule of law, equally elementary, which is frequently applied in such cases, is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact. In speaking of a conveyance found to be fraudulent on the part of the grantor, in *Tredwell v. Graham*, 88 N. C. 208, the Supreme Court of that State said: "The deed itself, though evidence conclusive, as to all matters between the parties, furnishes no evidence of the truth of the matters contained in its recitals, as against strangers, for as to them it is strictly *res inter alios acta*. (*Claywell v. McGimpsey*, 4 Dev. 89; *Griffith v. Tripp*, 8 Jones [N. C.] 64.) If voluntary, the law pronounces it fraudulent as to creditors, and he who took it must have had notice of that fact. As said by Pearson, C. J., in *Causler v. Cobb*, 77 N. C. 30, "when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration and without notice of the fraudulent intent on the part of his grantor." And in *Callan v. Statham*, 23 How. 477, it is said: "As they aver the payment was a transaction between themselves, and the principal part of a note was held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances tending to excite distrust and suspicion as to the *bona fides* of the deed."

So, also, in *Moshier v. Knox College*, 32 Ill. 155, the same rule was applied in a similar case. The court said: "But apart from all this, the appellees ought to retain this decree, because it

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is shown the indebtedness was for the purchase money of the premises, and appellant has not shown he was a *bona fide* purchaser for a valuable consideration, paying his money at the time, on the faith of the title so purchased. It was incumbent on the appellant to show not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase money; he must have paid it in fact before he had any notice of the appellee's equitable title. This is an essential element in the equity, which must exist in order to support appellant's claim, which he attempts to uphold. If he has not paid the purchase money, no wrong is done him by taking from him a legal title which cost him nothing." And the same principle is stated and applied in *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221; *Zimmer v. Miller*, 64 Md. 296; *Venable v. Bank of United States*, 2 Peters, 107; *Zelnicker v. Brigham*, 74 Ala. 598; *Purkitt v. Polack*, 17 Cal. 327; *Brown v. Texas Cactus H. Co.* 64 Tex. 396. And the principle is stated as elementary in *Bump on Fraudulent Conveyances*, p. 53.

There is another objection, I think, equally fatal to the defendant's claim. The writing which the appellant set up in his answer was made by him at the same time of the execution of the deed; at least they both relate to the same subject-matter, bear even date, and are between the same parties. We must therefore hold, especially in the absence of any evidence to the contrary, that they were executed at the same time, and taken together they constitute one entire transaction. Taken together, then, their effect was to create a trust in favor of Weber. This effect becomes distinctly manifest when the terms of the bond are considered. It is therein declared that "one of the inducements, and a material part of the consideration for said conveyance, is the agreement on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of three thousand dollars," etc. The meaning of this clause evidently is, that the right to repurchase was a part of the consideration for the deed, and in this way a valuable right or interest was reserved

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to the grantor, and this of itself would render the deed fraudulent and void. (*Sims v. Gains*, 64 Ala. 392.)

It follows from the views expressed that there was no error committed by the court below, and its decree is affirmed.

LORD, C. J., concurs in the result.

[Filed November 15, 1887.]

W. S. POWELL ET AL., APPELLANTS, v. WILLAMETTE VALLEY RAILROAD COMPANY ET AL., RESPONDENTS.

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36	224
15	393
48	459

FRAUD—ATTORNEY AND CLIENT—WHAT CONSTITUTES—DIRECTORS OF INSOLVENT CORPORATION.—Third parties employed an attorney of an insolvent corporation, who was also a director therein, to buy up the claims of creditors of the said corporation, the purpose thereof being to re-organize the concern. *Held*, that the relation of the attorney to the company required of him the utmost good faith towards the said creditors in his said dealings with them; but where they received all that their claims were worth, the fact that they were not informed of the contemplated re-organization would not constitute a fraud upon them on the part of the said attorney.

STOCK IN CORPORATION—SALE OF—WHAT CONSTITUTES—LIABILITY OF PURCHASER OF UNPAID.—Under the laws of this State (Hill's Code, § 8280), all sales of stock in a corporation subject the purchaser to the payment of any unpaid balance due on said stock. A debtor to the company conveyed his stock to a trustee, to sell the same to any person who would pay his indebtedness to the corporation therefor. *Held*, that this was no sale, and the trustee was not such purchaser as would incur a liability under said statute.

APPEAL from Multnomah County. Affirmed.

James K. Kelley, for Appellants.

Dolph, Bellinger, Mallory & Simon, and Ellis G. Hughes, for Respondents.

THAYER, J.—This appeal comes here from a decree of the Circuit Court for the county of Multnomah. The case has been here before on appeal from a decision overruling a demurrer. It is reported in 13 Or. 446, and the material parts of the complaint are there set out. The main facts in the case are, that the

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Dayton, Sheridan & Grand Ronde Railroad Company, a private corporation, incurred separate debts to the appellants respectively, which it was unable to pay, and in order to secure their payment, conveyed to the Willamette Valley Railroad Company, one of the respondents herein, in consideration of that company agreeing to pay said debts, all its property; that the latter company, in order to secure these debts, made a mortgage to one William M. Evans, as trustee, covering all the property that had been conveyed to it by the former company, and conditioned for the payment of the several debts due the several appellants; and in accordance with the terms of said mortgage, issued and delivered to each appellant a separate certificate, stating the amount due him under the mortgage on account of his debt due him from said Dayton, Sheridan & Grand Ronde Railroad Company; that the respondent Hughes, acting for certain parties who contemplated the formation of a company in Scotland to supersede the above-named companies in the business of operating and managing their railroads, purchased of the appellants their said debts at fifty cents upon the dollar; that said parties subsequently organized a company, known as the Oregonian Railway Company, Limited (also one of the respondents herein), and the said property was transferred to it, having first, however, been transferred to an intermediate company, known as the Oregon Railway Company, Limited (another of the respondents), and which was organized to receive and hold the same until the Oregonian Railway Company, Limited, could be organized in Scotland; and that Hughes, acting under a writing from one Joseph Gaston, also sold and transferred to said Oregonian Railway Company, Limited, five thousand shares, at the par value of five hundred thousand dollars, which had been subscribed by said Gaston, of the capital stock of said Willamette Valley Railroad Company, all of which was unpaid, and which was at the time in the hands of said Hughes to be sold and transferred. In the former case, as will be seen from the report referred to, only the sufficiency of the complaint was considered, and counsel for the appellant contends that the court failed to understand the real principles of the case, but viewed it merely

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as a suit to charge Hughes on account of alleged fraudulent misrepresentations it is claimed he made to the appellants when he purchased from them their several claims.

I think counsel substantially correct in that particular; but it will be observed that the complaint charges Hughes with having represented to appellants that certain other creditors of the Willamette Valley Railroad Company had agreed to accept fifty cents on the dollar in full of their claims, and that the latter company was insolvent; and that if they did not accept fifty cents on the dollar, they would get nothing, and that, relying on these representations, they agreed to accept that amount in full; that thereupon said Hughes paid them that amount, and they severally made the assignments to him; that Hughes was at that time director of said Willamette Valley Company, and had been employed by Evans, said trustee, as his attorney to represent the interests of appellants under the said mortgage to Evans, and that said Evans having died, he was the sole representative of their interests under it; that he was the owner of shares of unpaid stock of the Willamette Valley Railroad Company greater in amount than all its debts and liabilities, and was then under an agreement to purchase and obtain control of the property of the latter company, and to sell and deliver the same, and to procure the purchase and delivery of the claims of appellants for the least possible sum, for the joint benefit of himself and other parties then unknown to appellants; that the representations made by Hughes as to the insolvency of the Willamette Valley Railroad Company, and of other creditors, having agreed to take fifty cents on the dollar for their claims, were false; that the money he did pay appellants was not his own, but belonged to parties to whom he had sold the road; that appellants were ignorant of the facts relative to his sale of the road, and to whom he had sold it, and as to his ownership of capital stock, and were at the time, by reasons of the relations of trust and confidence in him, relying upon him to protect their interests, and by reason of these matters, Hughes did defraud them of fifty cents on the dollar of their claims.

It will also be seen that in the prayer for relief the court was

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asked to decree that Hughes pay the said claims. The prayer, however, is in the alternative in that respect. In view of these allegations and prayers for relief, the court might easily mistake the case as a suit to recover a personal decree against Hughes on account of the alleged fraudulent misrepresentations, it is claimed, he made to the said appellants. Besides, the counsel's attitude, when here before, with the allegations referred to, confessed by the demurrer, was quite different from what it is after the facts have been tried, and the findings made that the charges of false representations are untrue. They now graciously disclaim any reliance upon any actual fraud committed by Hughes, but insist that he is chargeable with constructive fraud.

Dealings of a fiduciary character. In other words, that Hughes, having been director, and the attorney of the Willamette Valley Railroad Company, at the time the claims were purchased from appellants, as found by the referee, rendered the purchase fraudulent and void as a matter of law. This is an important question in the case, for, unless the appellants can be relieved from their sale of the claims, unless their sale of them can be nullified, they have no standing in court. Conceding that their suit is well brought, whether Hughes acting the part he did in the purchase of the claims is fraudulent or not, depends, in my opinion, upon the nature of the transaction and the effect of it upon the appellants. I do not believe that his relations to the appellants on account of the positions he held in said company necessarily prevented him from negotiating a purchase of said claims for himself, and much less for other parties. In the first place, he may have acted with the strictest integrity to the appellants, and in the second, it may have been an advantage to them instead of an injury.

An attorney at law holds as sacred a relation to his client as can be formed in the business relations of life, yet his dealing with the client is not necessarily fraudulent, though it devolves upon him to establish that he acted honestly and fairly, whenever his good faith in the transaction is called in question. (*Bingham v. Salene*, 14 Pac. Rep. 523.) If Hughes did maintain a relation of trust and confidence to the appellants in regard

to their claims, it does not conclusively follow that he intended to defraud them by purchasing the claims at a discount, nor that they were defrauded thereby. If they realized for them all that could reasonably be expected under the circumstances—realized as much as they would if they had retained them—I do not see any tenable grounds upon which they can recover against him, or can claim that they were injured in consequence of what he did.

The referee, to whom the case was referred to find the facts, has found that the Willamette Valley Railroad Company was, at the time of the purchase of the claims, insolvent and unable to pay its debts; that all its property was subject to mortgage liens prior to the mortgage or trust deed made to Evans; that the prior liens amounted to about one hundred and fifteen thousand dollars, and were in process of foreclosure by suit then pending; and that it was generally believed at the time that all of said property was of no greater value than the amount of the prior liens. If that finding be correct, what hope or expectation was there that the appellants would realize anything unless they did sell the claims upon the terms proposed by Hughes, or what has since been developed to convince any one that they would have obtained anything therefor if they had retained them. Strip the case of the alleged misrepresentations of Hughes, and it is fully established that the appellants received even more than their claims were worth, unless his liability on the Gaston stock is taken into consideration. I think it apparent to any one that the appellants made an advantageous deal with their claims, unless they could have made Hughes liable upon the stock referred to. Upon that feature of the case, two questions are suggested: (1) As to the duty of Hughes to inform appellants of his relations to the said stock, and liability thereon; and (2) as to whether he was under any liability to appellants in consequence of the relation he held to the stock.

Appellants' counsel insist that directors of corporations have no right under any circumstances to use their official positions for their own benefit, or for the benefit of any one except the corporation itself, and that the powers and management vested

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in the directors of an insolvent corporation, which has ceased to carry on business, are solely powers to manage assets in trust for its creditors, and for their benefit; that these powers are held in trust by them for all the creditors; that directors or managing agents, who originally stood in a fiduciary relation to the company, become placed, after insolvency, in a fiduciary relation to its creditors; that the law will not permit an officer of a corporation to purchase claims against the corporation, and assign them to a firm of which he is a member; that a purchase by a trustee from his *cestui que trust* under any circumstances is voidable, and will be set aside on behalf of the beneficiary, and that it is not material that there should be an advantage or profit arising out of the purchase from the *cestui que trust*; that it is enough to show the relation and the purchase. I think the counsel in the main are correct in these several positions.

I have no doubt but that the propositions they assert are true in certain cases, but I doubt very much whether they are applicable throughout to the case under consideration, or that the proposition that a purchase by a trustee from his *cestui que trust* under any circumstances is voidable and will be set aside, can be maintained under the broad statement in which it is made. Mr. Pomeroy, in his work on Equity Jurisprudence, section 957, lays down the rule correctly. He there says that "there are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealings some conveyance or contract or gift. To such cases the principle literally and directly applies. The transaction is not necessarily avoidable, it *may* be valid; but a presumption of its invalidity arises which can only be overcome, if at all, by clear evidence of good faith, a full knowledge, and of independent consent and action. The second class includes all those instances in which one party, purporting to act in a fiduciary character, deals with himself in his private and

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personal character, without the knowledge of his beneficiary; as where a trustee or agent to sell, sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid. Nevertheless this particular rule is only a necessary application of the single general principle. The circumstances show that the act could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the result which is a rebuttable presumption in the first class of transactions, becomes a conclusive presumption in the second."

It requires no extraordinary discrimination to determine that the case under consideration, if regarded in the light of a trust, falls within the first class above mentioned. It is a case where the parties have "consciously and intentionally dealt with each other," and not a case "in which one party, purporting to act in a fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary." It is not a case where a trustee, admitting Hughes to have been a trustee, has disposed of property belonging to a beneficiary, nor where a trustee has purchased property of a beneficiary belonging to the latter. Hughes was not in charge of the appellants' claims. The latter had them, with full power to sell them or keep them; and if they chose to sell them to Hughes, and the transaction was fair, they have no grounds upon which to demand that the sale be set aside. Hughes' position in the debtor company, as director and attorney, required him especially, in his dealings with appellants, to maintain the utmost good faith, and I think the proof shows that he did so; and further than that, he did them a substantial favor when he assisted in the negotiation and purchase of their claims at fifty cents on the dollar; and most all of them who testified in the case, about eighteen or twenty of them, seem to be under that impression, and to express satisfaction at the result of the transaction. They had been informed, evidently, that they had a claim for the remainder of their debts, and, of course, were anxious to recover it, but did not pretend that Hughes, or those for whom he acted, had done anything in the affair of which they could complain;

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and it does not take more than half an eye to see that they got out of the affair more than they could have reasonably expected in the condition it was in. They had honest claims, no doubt, against the Willamette Company, and were entitled to have them paid in full; but the company was insolvent—was in the hands of a receiver.

There were liens on the property amounting to one hundred and fifteen thousand dollars prior to theirs, which were in process of foreclosure, and how could they have expected to even realize anything, and, in my opinion, never would, had it not been for some over-credulous Scotchman who evidently had more money than discretion. The latter conceived the idea of forming a new company to carry out the objects of the two defunct affairs, which were then wrecks. They engaged Mr. William Ried to purchase up the claims, and to get possession of the outstanding stock; Mr. Ried employed Mr. Hughes to conduct the matter. Hughes, as a matter of course, did not go and tell the creditors of the particulars of the scheme, if he knew them. He claims he did not know them, and I believe the referee has found that he did not. The evidence may warrant the finding, but I am too well acquainted with Mr. Hughes, and naturally too skeptical to believe that he was ignorant concerning the matter. But it made no difference his not telling them. If he had done so, they would more than likely have become excited, and, if possible, have frustrated the plan, and have done themselves a serious injury financially. I think it was prudent in his not telling them. They knew he was acting in the matter for other parties, and that he was buying the claims with the funds of such parties; and that they had a recourse upon the subscribers for stock in the Willamette Company that had not been paid up. They may not have known that Hughes held any such stock, and I am not prepared to say that he was obligated to tell them if he did.

Transfer of stock. But, conceding that it was his duty to make known to them the facts upon which appellants now claim he was owner of such stock, and liable thereon, is it true that he was such owner and under any such liability? The referee

found "that on the twenty-ninth day of December, 1879, at the special instance and request of the defendant E. G. Hughes, acting for and on behalf of William Ried, the agents of the then promoters of the defendant, the Oregonian Railway Company, Limited, J. Gaston, owning and holding a large majority in interest in the capital stock of the Dayton, Sheridan & Grand Ronde Railroad Company, and the Willamette Valley Railroad Company, to wit, one hundred thousand dollars in the first-named corporation, and five hundred thousand dollars in the last-named corporation, executed and delivered to the said Hughes an instrument in writing, of which the plaintiff's exhibit No. 134, in the testimony herein, is a copy; and thereafter, on the tenth day of February, 1880, at the special instance and request of the said Hughes, the said J. Gaston executed and delivered to Hughes an instrument in writing, of which defendant's exhibit No. 241, of the testimony herein, is a copy." The substance of the two instruments in writing is that Gaston, in consideration of, and to procure release and discharge of all debts and liabilities incurred by him in the construction of the said Dayton, Sheridan & Grand Ronde Railroad, assigned to Hughes, as trustee, all his right, title, and interest in and to the stock of that company, and of the Willamette Valley Railroad Company, to have and to hold the same in trust for the use and purpose, to wit, to convey the same absolutely and unconditionally to such person, persons, or corporation as should within a certain time thereafter procure Gaston's full release and discharge of and from such debts and liabilities. This appears to have been, in effect, all the sale there was of said stock from Gaston to Hughes. The instruments were signed only by the former, and the latter obtained no other title to the stock than what was thereby conveyed.

The statute provides that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, . . . and subject such purchaser to the payment of any unpaid balance, due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser." (Misc. Laws, ch. 7, § 14.)

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Was the transaction between Gaston and Hughes such a sale of the stock, by the former to the latter, as would subject the latter to the payment of the amount due thereon, under said provision of the statute, is the question to be solved. The liability of a purchaser of stock in such cases is statutory; and unless the transaction between Gaston and Hughes constituted a sale of the stock within the meaning of the statute, such liability did not attach. It is not a case where a person has had stock transferred to him upon the books of the company, and thereby estopped himself from denying his ownership of it. There no sale in fact is necessary in order to charge the transferee. But here the question must be determined wholly upon the effect of the two instruments referred to. If they evidence such a sale of the stock as suggested, then Hughes became liable; otherwise not. The assignment of the stock was to Hughes as trustee, to have and to hold the same in trust for the use and purpose, to convey absolutely and unconditionally to any one who would procure, in a certain time, Gaston's release and discharge from certain debts, etc. This certainly was no sale to Hughes; it was no more than a power to enable him to sell upon certain specified terms. It vested no title in Hughes, more than a power of attorney to dispose of the stock would have done. It did not transfer to Hughes all the rights of Gaston in the stock, or any rights except to look up a purchaser and sell him the stock upon the terms specified in the instruments, nor did it vest in Hughes the ownership of the stock as a trustee; it merely clothed him with a special and limited authority—made him an agent for Gaston to do a particular thing for the latter's advantage.

"Sales of stock," within the meaning of the statute, are transfers of the general legal title. They could not have been meant to be anything less, or the legislature would not have provided that they should operate to "transfer to the purchaser all the rights of the original holder." In this case all the rights of Gaston in the stock remained in him, except so far as they were suspended by force of the said instruments. If Hughes had failed within the time limited in the said instruments to find a person who would procure Gaston's release from said debts and

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liabilities, his authority would have ceased, and Gaston's power over the stock been restored to its former extent. How could the parties have intended a sale of the stock to Hughes, when the consideration was to be paid by other parties, and the conveyance thereof, "absolutely and unconditionally," was to be made to such parties. It is true that the granting clause in the instruments is sufficiently broad to constitute a sale of the stock; but when all parts of them are taken together, and the general object and purpose of the instruments considered, they must, I think, be construed as only conferring a power upon Hughes to sell Gaston's stock to some person who would, within the time therein limited, procure him a full release and discharge from the debts and liabilities referred to.

If this view is correct, then Hughes was not such a purchaser of the stock in question as would create a liability on his part in favor of the appellants; and his failure to inform them of his relations to the stock, if in any case he would have been required to do so, was not a violation of any duty he was under to them. I am unable to discover that Hughes is chargeable with fraud, actual or constructive, in the transaction of buying up the claims, or that the appellants were defrauded thereby. In my opinion, if the appellants had a right to join in the suit as co-plaintiffs, they have not succeeded in establishing a cause of suit herein. It is claimed that this suit is in the nature of a creditor's bill, but I do not see how it can be so regarded; a creditor's bill was to reach assets, and compel an application of them to the payment of a complainant's claim. This suit is to establish a personal liability against the respondents; it is to compel them to account for property that came into their hands charged with the payment of their claims, and to establish a liability against them as purchasers of unpaid stock. In order to pursue that remedy alone, the appellants had a right to unite as plaintiffs; but when they sought relief on the grounds of the actual fraud of the respondents, they were required to show that it was a joint tort, at least we so held in the former case, and I deem it proper to make this explanation, so that the profession may not be misled by that holding.

The decree appealed from will be affirmed.

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[Filed November 15, 1887.]

D. E. BUDD, APPELLANT, v. MULTNOMAH STREET
RAILWAY COMPANY, RESPONDENT.

FORMER APPEAL—LAW OF THE CASE.—The ruling of this court on the former appeal has become the law of the case.

REMEDY—ACTION AT LAW WILL NOT LIE, WHEN.—An action at law will not lie to recover the possession of a franchise. It is not tangible or capable of any kind of physical identification or delivery.

REMEDY—ACTION TO RECOVER DAMAGES.—At common law, an action on the case would lie to recover damages for the disturbance of the plaintiff in the enjoyment of a franchise; but in such case the party recovers damages, and not the possession of the particular franchise.

ESTOPPEL.—When the plaintiff was the efficient cause of the defendant making large expenditures of money, and he was one of its officers at the very time and superintendent of the work, he is estopped, and could not set up his own acts, as such superintendent, as the identical wrong committed by defendant, of which he now complains.

GRANT TO D. E. BUDD AND SUCH PERSON AS HE MAY ASSOCIATE WITH HIMSELF THEREIN.—Effect of such grant considered, but not expressly decided.

APPEAL from Multnomah County. Affirmed.

H. T. Bingham, and *Cornelius Taylor*, for Appellant.

Killin & Starr, and *Moreland & Masters*, for Respondent.

STRAHAN, J.—This is an action to recover damages against the defendant, at the rate of one thousand dollars per month, from and after the twenty-third day of October, 1882, for the alleged unlawful disturbance, by the defendant, of the plaintiff in the use and enjoyment of a certain franchise granted by the city of Portland to the plaintiff. The franchise set up in the complaint is the right and privilege to lay down and maintain an iron railroad track or tracks, and to operate street railways within the city of Portland, upon certain streets mentioned in the ordinance making the grant. The grant is made to D. E. Budd, and such other person or persons as he may associate with himself therein. The complaint alleges compliance with the terms of the ordinance on the part of Budd. The manner of such compliance is fully alleged. It is stated that on or about June 14, 1882, this plaintiff and others duly incorporated themselves under the name of the Multnomah Street Railway Com-

pany, and as such corporation, *they* purchased the materials, constructed a line of street railway in accordance with the terms of said ordinance No. 3,477, and in such manner as to comply with the terms and requirements of said ordinance. . . . "And thereafter they procured street railway cars of the kind required by said ordinance, and placed them upon the lines of said railway, provided horses for drawing the same, and placed the said railway and cars in complete order and condition for operating the same, in the manner and subject to all the terms, restrictions, and conditions in said ordinance No. 3,477 contained and required; that the plaintiff procured the construction of said street railway, and the obtaining of said horses and purchase of said cars, as aforesaid, by the Multnomah Street Railway Company, but he never assigned the whole or any portion of said right and privilege granted to him by ordinance No. 3,477 to defendants; that plaintiff never assigned the whole or any portion of the franchise or privilege granted to him by said ordinance No. 3,477, aforesaid, nor has he ever associated with him any person or persons whatever in the use and enjoyment of the same; and ever since said June 12, 1882, he has been, and now is, the sole owner of said franchise, and of all the rights, privileges, and immunities lawfully pertaining thereto or existing thereunder."

It is then alleged, in substance, that on the twenty-third day of October, 1882, the plaintiff was the sole and exclusive owner of the right of carriage and conveyance of passengers thereon and over the same for hire in the railway cars as aforesaid. Nevertheless, the said defendant, the Multnomah Street Railway Company, not being the owner of said franchise and privilege, or of any interest therein, and not being associated with the plaintiff therein, but well knowing the premises, and contriving to disturb and injure the plaintiff in the peaceable and lawful enjoyment and use of his said franchise of operating said street railway and carrying passengers thereon for hire, on the said twenty-third day of October, 1882, and continuously thereafter ever since to the present time, injuriously, unlawfully, and against the will of the plaintiff, has claimed the street railway and cars and horses as its own, and has possessed itself to the entire exclusion of

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plaintiff of said street railway cars and horses, and has occupied by the said railway track, cars, and horses, the portions of the streets aforesaid, upon which he has the right, as against the defendant, to maintain and operate a street railway, and has thereby prevented the plaintiff from maintaining and operating a street railway thereon as he otherwise could and would have done, and has carried and conveyed divers passengers for hire over and upon said street railway heretofore mentioned and described, and continues so to do up to the present time; and that by reason thereof, the plaintiff has been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to him from the enjoyment of said franchise, and has been greatly disturbed in the possession thereof, and his right and title thereto, to his damage in the sum of one thousand dollars per month from said twenty-third day of October, 1882. The prayer is for judgment against the defendant for the sum of one thousand dollars per month, from said twenty-third day of October, 1882, and for the possession of his franchise and privilege aforesaid, and for costs, etc.

This is the second appeal in this cause. When it was formerly here, it was upon a demurrer to the complaint, and this court then reversed the ruling of the court below sustaining the demurrer, and remanded the cause for further proceedings. This court then said: "The main question presented by the demurrer was, whether the appellant, when he incorporated with others under the name of the Multnomah Street Railway Company, necessarily made the company the grantee of the franchise, whether he thereby *ipso facto* associated with himself therein the other persons so as to entitle them to the rights and privileges granted by the ordinance. Can the allegation in the complaint, that the appellant had never associated with himself any person or persons whatever in the use and enjoyment of the franchise be true, in view of the fact that he and others incorporated themselves under said name, and that the corporation purchased material and constructed and equipped the railway as required by the ordinance by which the right was granted? and that the privilege of building the road, and equipping and operating it,

with the right to exact fare for transporting passengers thereon, is a positive right, and has an identity distinct from the structure and equipage, of which there can be no doubt? The appellant had the option, under the ordinance, to reserve the privilege to himself exclusively, or have it vest in himself, or others whom he might associate with himself therein. He could have contracted with some construction company to build and equip the road for him for a compensation to be paid therefor, and retained exclusive ownership of the franchise; or he could have associated with himself such company, and thereby admitted its members to a joint proprietorship in it. He alleges in his complaint that he adopted the former course, and whether that is true or not, depended in the opinion of this court upon proof of facts. . . .”

I have made this long extract from the opinion, for the reason it has not been published, and for the further reason that it has become the law of the case, and, so far as the facts are the same, must govern on this appeal. When the case was returned to the court below an answer was filed by the defendant, issues of fact being duly joined. The case was tried by the court without the intervention of a jury, which trial resulted in findings and judgment for the defendant, from which judgment this appeal is taken. No exceptions were taken upon the trial to the admission of evidence, and the case is here upon the questions of law arising on the findings.

So much of the findings of fact as are necessary to a proper understanding of the legal questions discussed are as follows:—

“2. That on the tenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey, entered into a mutual oral agreement, whereby it was mutually agreed and understood by each of said parties that said W. A. Scoggin and E. J. Jeffrey should join with said D. E. Budd in the execution of the bond, which said Budd was by ordinance required to file with the auditor of said city, and that said Budd and Scoggin and Jeffrey would thereupon join and associate together on equal terms, and exercise and use the franchise granted to said Budd and his associates by said ordinance, and together build and operate and own in common and in equal shares the street railroad contem-

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plated and provided for by said ordinance. And thereupon, in pursuance of said agreement and understanding, said Scoggin and Jeffrey, on said 10th of July, 1882, did join said Budd in the execution of a bond conditioned as required by said ordinance, and the same was on said 10th of July, 1882, approved by the mayor of said city, and on the next day filed with the auditor of said city, along with the written acceptance of said Budd, of the terms and conditions of said ordinance as required thereby.

"3. That on the thirteenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey orally agreed with each other that they would form, or cause to be formed, a corporation, under the laws of Oregon, in which they would be equal owners of stock, for the purpose of constructing and operating the railroad contemplated by said ordinance, and of using the franchise granted thereby; and they did thereupon, on said thirteenth day of July, 1882, cause to be formed a corporation known as the Multnomah Street Railway Company. The defendant herein, and said Budd, Scoggin, and Jeffrey subscribed each ten thousand dollars to the capital stock of said company, and said Budd, Jeffrey, and Scoggin orally agreed each with the other that said corporation should use, own, and exercise the franchise granted by said ordinance, and construct and operate the roads provided thereby for its own use and benefit; but said Budd did not then, nor has he ever executed any written assignment, transfer, or conveyance of the franchise granted by said ordinance, nor did he make any other written articles or agreement of association with said Scoggin and Jeffrey than the articles of incorporation of the defendant company.

"4. That by articles of incorporation the defendant corporation, among other things, proposed to build, own, and operate street railways in the city of Portland, Oregon, and to acquire, by purchase or otherwise, any street railway constructed by any other person, and also to acquire, by purchase or otherwise, any franchise granted by the city of Portland for the construction and operating of any street railways in said city.

"5. That said corporation duly perfected its organization,

and E. J. Jeffrey and W. A. Scoggin and D. E. Budd constituted the stockholders, and were the directors of said corporation, and E. J. Jeffrey was elected and acted as president, W. A. Scoggin was elected and acted as secretary, and D. E. Budd was elected and acted as superintendent of said corporation, and under that organization the said corporation proceeded to the execution of the purposes of its incorporation.

"6. That said E. J. Jeffrey and W. A. Scoggin, relying upon and by reason of the mutual agreement and understanding had and entered into between them and said Budd, mentioned in paragraphs 2 and 3 of these findings, each paid up the subscriptions made by them to the capital stock of said corporation, being the sum of ten thousand dollars each, and said corporation, by said Jeffrey as president and director, and said Scoggin as director and secretary, and said Budd as director and superintendent, proceeded to construct, on said Washington and Eleventh streets, an iron railway, and to equip the same at a cost of about twenty thousand dollars, and to operate the same, and to use and exercise the franchise granted by said ordinance No. 3,477, and continued to do so from about January, 1883, until the commencement of this action; and during said period, the defendant, under and by virtue of the franchise granted by ordinance No. 3,477, has collected and received from passengers carried upon its road on Washington and Eleventh streets large sums of money; but the evidence does not show how much, nor does it furnish any basis for an account of the receipts and expenses of operating said railway, or of the profits of said franchise.

"7. That said D. E. Budd, defendant, was superintendent of the defendant corporation for about nine months, and took charge of the work of constructing the road on Washington and Eleventh streets, and of the operating of said road after it had been built and furnished, and received for his services in that behalf a salary from the defendant corporation of one hundred dollars a month.

"8. That said D. E. Budd, up to about the time of the commencement of this action, acquiesced in and fully consented to

and in the claims of the defendant corporation in respect to the exercise of said franchise by it, and in respect to the ownership of said road and franchise as set forth in these findings, and did not, prior to the commencement of this action, demand from said defendant corporation the possession of said streets, or any portion thereof. Said D. E. Budd did not furnish any money for the construction of said railway, but the said railway was wholly constructed with funds provided by the defendant corporation, and contributed by the said E. J. Jeffrey and W. A. Scoggin as stockholders.

“9. That said franchise, independent of the railway and equipment, is of the value of ten thousand dollars (\$10,000).”

As conclusions of law, the court found that the plaintiff was not entitled to the possession of the franchise, but that the defendant was entitled to such possession. There were no findings as to the amount of damages, and so far as appears from this record, there was no evidence offered on that subject.

I do not understand that an action at law will lie for the recovery of the possession of a franchise. It is wholly intangible, and not capable of any kind of physical identification or delivery. Therefore a judgment that a party recover such an “airy nothing” would be incapable of enforcement by the ordinary form of process provided for the enforcement of the final judgments of the courts in this State. But as I understand it, this action is in substance what would be regarded at common law an action on the case to recover damages for the disturbance of the plaintiff in the employment of a franchise, and there can be no doubt that such an action will lie. (1 Chitty’s Pleadings, pp. 131–142.) But in such case it is damages for the wrong done which the party recovers, and not the possession of the particular franchise. And this, in effect, was what was held by this court on the former appeal. In this view of the law, no damages having been found for the plaintiff, it is difficult to see on what ground he would be entitled to any relief here, even though we should be of the opinion that the findings show him to be still the exclusive owner of the franchise granted to him by the city of Portland. But, as has been shown, this court held on the former appeal

that the plaintiff might have associated with himself such company—the defendant—and thereby admit its members to a joint proprietorship in the enjoyment of the franchise in question; and that whether he had done so or not, was a question of fact to be determined by proof. The findings of fact, I think, settle this question against the plaintiff. He did associate with himself Jeffrey and Scoggin, and the three associates built the street railway, for the purpose of using and enjoying the identical franchise which had been granted to the plaintiff.

To all of these proceedings, the findings show the plaintiff fully assented, and in fact assisted in carrying them into full effect. Do these acts constitute a wrong to plaintiff? (*Thorne v. Mosher*, 20 N. J. Eq. 257.) I cannot perceive, under these findings, what wrong the plaintiff has suffered by the acts of the defendant. It was argued here that the defendant was bound to produce some writing by which the plaintiff had conveyed to it the franchise described in the complaint; that without writing signed by the plaintiff, defendant was a trespasser.

We do not find it necessary to decide at this time whether the right to lay down a railroad track in the streets of the city of Portland, to run cars thereon, and to take fare therefor, is an estate or interest in land so as to require a writing to convey it, or as to whether, lying in a grant, it can only pass by deed. The findings show such consent, acts, and acquiescence, and the expenditure of money on the faith of the grant, with the plaintiff's consent, as to preclude him from now claiming that the defendant's acts were wrongful. He was the active and efficient cause of the defendant's making large expenditures of money; he was one of its officers at the very time, and superintendent of the work. We could not allow him to now set up his own acts as such superintendent as the identical wrong committed by the defendant, of which he now complains.

In addition, the grant was to "D. E. Budd and such other person or persons as he may associate with himself therein." I am inclined to think this grant carried the thing granted directly to Budd's associates equally with himself, and that the act of association was all that was necessary to point out and identify

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the grantees, and that, for this purpose, no writing was necessary; but if writings were necessary, the signing of the articles of incorporation of the defendant company would be sufficient.

The principle here stated is somewhat analogous to that involved in *Spring Valley Water Works v. San Francisco*, 22 Cal. 434. It was there held that when the grant was to George H. Ensign and his associates and their assigns, who should within sixty days organize themselves in conformity with the laws regulating corporations, as soon as the corporation was organized the franchise granted passed to it by operation of law, without any formal assignment. And the term "associates" received a similar construction in a case involving principles akin to that. (*State v. Sibley*, 25 Minn. 387.) And I think the reasoning of the court in *Lechmere Bank v. Boynton*, 11 Cush. 369, tends to support the view suggested.

LORD, C. J.—If the proper construction of the words, "and such other persons as he may associate with himself therein," is, that by the act of associating others with him, the ordinance, *ex proprio vigore*, vests the franchise in them jointly, as intimated in the opinion, that construction is decisive of the case, and upon that ground I can concur in the result. On the other hand, if such words mean that the grant of the franchise is to Budd, and only to such persons as he may associate himself therein when he so elects, and they agree to become such associates, then as the subject-matter of the grant is an incorporeal hereditament, and lies in grant, it can only pass from him to them by deed, and the judgment of the court below is error, and ought to be reversed. It was on this last theory that the case was tried and the argument made here, the chief controversy being as to the validity of a parol agreement to effect such transfer. The court held it sufficient, which I think was manifest error.

THAYER, J., expressed no opinion, but concurred in the result.

Decision of the court below affirmed.

Opinion of the Court—Strahan, J.

[Filed November 15, 1887.]

D. E. BUDD, APPELLANT, v. MULTNOMAH STREET RAILWAY COMPANY ET AL., RESPONDENTS.

CORPORATION—STOCK—"CALLS."—The board of directors of a private corporation may make "calls" upon stock without stating in their proceedings that such "calls" are for a corporate purpose, or that the business of such corporation required that such subscriptions should be paid.

DIRECTORS—POWERS OF CORPORATION.—Under section 3225 of Hill's Code, the power to make "calls" upon stock is one of the "powers" vested in the corporation, and to be exercised by the board of directors from and after their first meeting.

"CALL."—**HOW MADE.**—All that is necessary is that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part or all the unpaid subscription.

SAME—STOCKHOLDERS CANNOT QUESTION.—The necessity of the "call" is not open to question by the stockholders. The determination of that question is for the board of directors.

CORPORATION—FORFEITURE OF STOCK—STATUTE.—A corporation has no inherent power to forfeit or sell the shares of stock held by a delinquent stockholder. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute.

BY-LAW FOR SALE OF STOCK FOR DELINQUENT ASSESSMENTS.—Subdivision 6 of section 3221 of Hill's Code confers upon private corporations power to make by-laws for the sale of any portion of its stock for unpaid assessments thereon; but such by-laws must "not be inconsistent with any existing law."

BY-LAW—MUST BE GENERAL AND UNIFORM.—A resolution directed against the stock of a particular stockholder named is not a by-law. A by-law to be reasonable ought to be general; it ought to affect every delinquent subscriber and all delinquent stock alike, and it ought to be directed against all within the sphere of its operation.

CONVERSION OF STOCK—MEASURE OF DAMAGES.—In case of the conversion of stock, the ordinary rule as to the measure of damages is the value of the stock at the time of the conversion, or a reasonable time thereafter; but an exception is, when a party has suffered only a technical conversion without any pecuniary loss, he can recover only nominal damages.

MEASURE OF DAMAGES—COMPENSATION.—As a general rule, the plaintiff ought to recover such sum as will compensate him for the injury he has suffered by the wrong of the defendant.

APPEAL from Multnomah County. **Affirmed.**

H. T. Bingham, and McDougall & Bower, for Appellant.

Killin & Starr, and Moreland & Masters, for Respondents.

STRAHAN, J.—This is the second appeal in this action. The opinion of the court on the former appeal is reported in 12 Or. 271. After the cause had been remanded, an answer was filed

and issues of fact duly formed. Upon a trial which was had before the court without a jury, the following facts were found:—

“1. That the defendant, the Multnomah Street Railway Company, was organized by the filing of articles of incorporation in the office of the county clerk of Multnomah County, and in the office of the secretary of State, on the fourteenth day of July, 1882, and that D. E. Budd thereafter, on the twentieth day of July, 1882, in due form, subscribed for one hundred shares of the capital stock of said corporation, of the nominal par value of ten thousand dollars, and said Budd had no other title to stock in said corporation than such as he acquired by said subscription.

“2. That at the meeting of the stockholders of said corporation, held on the twentieth day of July, 1882, E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were duly elected directors of said corporation, and duly qualified as such directors.

“3. That at a meeting of the board of directors of said corporation, held on the fourth day of April, 1883, at the city of Portland, where the principal office and place of business of said corporation was and is fixed, the said E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were present, and it was then and there voted—E. J. Jeffrey and W. A. Scoggin, yes, and D. E. Budd, no—that an assessment of one hundred per centum be levied on all the stock of the corporation, the Multnomah Street Railway Company, said assessment to be paid by the 25th of April, 1883.

“4. That on the fifteenth day of April, 1883, a written notice was served on D. E. Budd, signed by W. A. Scoggin, secretary of said corporation, and issued by order of E. J. Jeffrey, president, calling a meeting of said corporation, to be held on the twenty-sixth day of April, 1883, at the hour of two o'clock P. M., at the office of the company, in the city of Portland, for the purpose of disposing of D. E. Budd's stock for delinquent assessment.

“5. That on the twenty-sixth day of April, 1883, a meeting of said directors of said corporation was held at the hour and at the place designated in the above-described notice, at which E. J. Jeffrey and W. A. Scoggin alone were present. It was

voted by resolution, then and there passed, declared, and ordered, that 'whereas, D. E. Budd has failed to pay any part of the one hundred shares of the capital stock of the said corporation held by him, according to the resolutions passed by the board of directors of said corporation, on the fourth day of April, 1883, that his assessment upon said one hundred shares of stock be and is declared delinquent, and that the secretary be directed to sell said one hundred shares of stock, or so much as shall be necessary to satisfy such assessment, after giving thirty days' notice of the time and place of such sale, by publication in the Sunday Mercury, a paper published in, and of general circulation in the city of Portland, Oregon.

"6. That notice of the sale of said stock of D. E. Budd for delinquent assessment was published for thirty days in said Sunday Mercury, a weekly newspaper, next preceding the day of sale, which day of sale was by said notice designated as May 30, 1883, at the hour of two o'clock P. M.; and thereupon, on the said thirtieth day of May, 1883, at said hour, said stock of D. E. Budd, being one hundred shares, was offered for sale by W. A. Scoggin, secretary of said corporation, with the knowledge of and under the direction of E. J. Jeffrey, president, and was then and there bid off by and purchased by Amos N. King and E. A. King, who were the highest bidders for the same, for the sum of ten thousand two hundred dollars, of which amount ten thousand dollars was applied in payment of the subscription and assessment of said Budd.

"7. That the value of said stock, in case the subscription thereon had been paid, was ten thousand two hundred dollars, and subject to the assessment of one hundred per centum on said subscription; the value over and above such assessment was two hundred dollars.

"8. That after said sale said stock was transferred on the books of said corporation from the name of said D. E. Budd to the names of Amos N. King and E. A. King, and said D. E. Budd was no longer recognized by said board of directors of said corporation as a stockholder therein.

"As conclusions of law, the court finds that the plaintiff is

entitled to recover from the defendants the sum of two hundred dollars, and costs and disbursements, and to have judgment for said sum."

On motion of the plaintiff, the court makes the following additional findings in this case, to wit:—

"1. The defendants in their proceedings to sell the stock of D. E. Budd for the payment of subscription and assessment levied thereon, caused notice of such sale to be published in the Sunday Mercury newspaper, as follows: It was inserted five times. The first insertion was on the twenty-ninth day of April, 1883, and the last was on the twenty-seventh day of May, 1883, and the sale was by said notice appointed and did in fact take place on the thirtieth day of May, 1883.

"2. At the time said notice was inserted and standing in said newspaper, the said newspaper was published and circulated as a weekly newspaper; was printed on Saturday of each week, but bore date of the Sunday following; was circulated to a limited extent on Saturday night of each week, but principally circulated on Sunday, running the same as its date. It did not receive nor publish the telegraph news, but had a large circulation, equal to that of any weekly newspaper published in Oregon, except the Oregonian. Its place of publication and where it was printed was in the city of Portland, Oregon."

On this appeal several questions of law have been discussed, which we will now consider.

1. *Assessment of stock.* It is claimed that the "call" or assessment of one hundred per centum on the stock of the defendant corporation was unlawful and unauthorized, for the reason that the resolution adopted by the directors does not show that it was made for any corporate purpose; nor does it show that any demand of the business of the company required that the subscriptions should be paid. This call appears to have been made by the board of directors of the defendant corporation, at which all were present, and there can be no question but what they had the power to make it. If the statute were entirely silent as to who should exercise the corporate power of making calls on stock, that power would devolve upon the directors

(Cook on Stock and Stockholders, § 109); but the statute contains ample provisions covering this subject. Section 3225 of Hill's Code provides: ". . . . From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise provided in this chapter."

It is not provided in said chapter that this particular power is vested elsewhere; therefore there can be no question but what it is one of the "powers" which is to be exercised by the directors. And such, it is believed, is the effect of the intimation of this court in *Willamette F. Co. v. Stannus*, 4 Or. 261; nor is there anything in the other objections taken as to the form of the call. All that is really necessary is, that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part or all the unpaid subscription. (Cook on Stock and Stockholders, § 115.) So, also, the necessity of the call is not open to question by the stockholders. The determination of that question is for the board of directors. (*Chateau Ins. Co. v. Floyd*, 74 Mo. 286; *Judah v. American L. S. Ins. Co.* 4 Ind. 333.)

2. *Sale for non-payment of assessment.* Counsel for the appellant have argued that the proceedings which were taken by the defendant corporation, upon the failure of Budd to pay the call upon his shares of stock, were entirely irregular and unauthorized by law, and in this we are inclined to think they are correct. A corporation has no inherent power to forfeit or sell the shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute. (*Westacott v. Minnesota Mining Co.* 23 Mich. 145; Cook on Stock and Stockholders, § 123.) But it is claimed, on the other hand, that the statute has conferred the power exercised in this case, and counsel cite section 3221, subdivision 6, of Hill's Code. That section contains a particular enumeration of the powers conferred on all corporations organized under said act. By subdivision 6 they are empowered "to make by-laws not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due

thereon, which sale may be made without judgment or execution; *provided*, that no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs." This section confers the power, but it also prescribes the manner in which it shall be exercised. It must be by a "by-law not inconsistent with any existing law." In such a case, if the corporation determines to proceed by a sale of the stock for unpaid assessments instead of by action to recover the money, it must have such a by-law as the statute prescribes, and compliance with such by-laws must be made to affirmatively appear. But it is claimed that the corporation defendant enacted a by-law for this particular case, and that the same appears in finding number 5. That resolution is in no sense a by-law. It is directed especially against the interests of a single stockholder. How many others may be delinquent does not appear; possibly none in this particular instance. But that does not affect the principle. If a majority of a board of directors of a private corporation may in any case pass such a resolution, and enforce it, they may do it in every case. The majority need not enforce the payment of calls, only in particular instances, to be designated by resolution.

As was said in *People v. Throop*, 2 Wend. 131: "The resolution entered by the directors is not entitled to the name of a by-law; it is a mere direction to the officers to exclude a director of the bank from the enjoyment of his rights. It is aimed at a single individual; not a general regulation, affecting the directors at large or the stockholders." I think that any by-law enacted under this section of the Code to be reasonable ought to be general; that is, it ought to affect every delinquent subscriber and all delinquent stock alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law.

As was said in *Comms. v. Gas Company*, 12 Pa. St. 318: "A by-law must be reasonable, and for the *common benefit*; it must not be in restraint of trade, nor ought it to impose a burden

without an apparent benefit." (*Village of Buffalo v. Webster*, 10 Wend. 95; *Mayor of Hudson v. Thorne*, 7 Paige, 261; *Stokes v. City of New York*, 14 Wend. 87.) So in *Goddard v. Merchants' Exchange*, 9 Mo. App. 290, it is said: "But by-laws must be certain, must be directed to all within the sphere of their operation, and must operate equally." So, also, in the *People ex rel. Patrick Stewart v. The Young Men's Father Matthew T. A. B. Soc. No. 1 of Detroit*, 41 Mich. 67, it was said: "It is plain, however, that all corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not *apply to all alike*, and cannot be compelled to receive, as matter of grace, anything which is a matter of right; neither, on the other hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporations."

The sale of the plaintiff's stock by virtue of the resolution set out in the fifth finding was clearly illegal, and without authority.

3. *Measure of damages.* The measure of damages remains to be considered. The appellant contends that if the sale was illegal, he is entitled to recover in this form of action the full amount bid for the stock, without any regard whatever to the fact that he had paid nothing for it. In this class of cases, the authorities do not seem quite uniform as to the proper measure of damages in case of wrongful conversion. Perhaps the better rule is, the value of the stock at the time of the conversion, or a reasonable time thereafter. (Cook on Stock and Stockholders, § 581.) But this general rule is subject to exceptions, one of which is, where the plaintiff has suffered only a technical conversion, without any actual pecuniary loss, only nominal damages can be recovered. (§ 586, *supra*.) And the general rule in assessing damages is compensation; that is, that the plaintiff shall recover such sum as will compensate him for the injury he has suffered by the wrong of the defendant.

In this case these shares were encumbered by an assessment equal to their par value; that is, the purchase price of those shares for which the plaintiff was indebted to the defendant corporation. That sum must, in any event, be paid to the defend-

Points decided.

ant if the shares would bring it upon the market. The findings show that they did bring that sum, and two hundred dollars more, and that of the proceeds of the sale ten thousand dollars were applied in satisfaction of plaintiff's debt to the defendant corporation. What effect these proceedings had upon the plaintiff's right to the stock in question we cannot now consider, because the question is not involved here.

All that we now decide is, that under these findings the sale of the plaintiff's stock was irregular and unauthorized, and that the court below did not err as to the measure of damages under the peculiar facts of this case. Whether the prosecution of this action to final judgment by the plaintiff is to be regarded as an election on his part to claim the money rather than the stock, and thereby ratify and affirm the irregular proceedings taken against him (*Morrison v. Crawford*, 7 Or. 472), or whether actual payment of the judgment is necessary to divest his title to the shares, we do not now consider or decide.

Let the judgment of the court below be affirmed.

THAYER, J., concurred.

[Filed November 15, 1887.]

MOSES S. PIKE, APPELLANT, v. T. KENNEDY ET AL.,
RESPONDENTS.

PUBLICATION OF SUMMONS.—Where the facts alleged in the affidavit show that the realty mortgaged was situated within the State, and that the suit to foreclose the lien upon it was brought by the parties to whom the mortgage was originally given against *those only* who gave it, and no third person being disclosed as a party by virtue of ownership of the *res*, subject to the mortgage, it necessarily appeared by such facts that the defendants Pike and wife still owned said realty when the foreclosure suit was instituted, and when the affidavit for the order was made. *Held*, that the facts alleged were sufficient to sustain the order for publication in a collateral proceeding.

DUE DILIGENCE—WHEN SHOWN.—An affidavit "that said defendants reside at Walla Walla, W. T., which is their postoffice address, that personal service cannot be made upon said defendants for the reason that they have departed from the State, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla," is sufficient to establish, in a collateral proceeding, that defendants after due diligence cannot be found within the State, under the requirements of section 56 of Hill's Code.

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APPEAL from Multnomah County. Affirmed.

W. Scott Beebe, and *Williams & Williams*, for Appellant.

The affidavit does not show that defendants in the foreclosure suit had any property in the State. (Code, p. 116, § 55, subd. 3; *Spies v. Halstead*, 71 N. C. 209; *Wimer v. Fitzgerald*, 19 Wis. 396; Code, § 506, p. 213.)

It does not appear from said affidavit that defendants could not be found within the State, or that any effort whatever had been made to find them, or ascertain their whereabouts, or where they were at the time the affidavit for the order of publication was made. (Code, p. 116, § 55; *Carleton v. Carleton*, 85 N. Y. 313; *Rickertson v. Rickertson*, 26 Cal. 149; *Forbes v. Hyde*, 31 Cal. 350; *Thompson v. Judge*, 54 Mich. 236; *Kennedy v. Trust Co.* 32 Hun, 35; *McKubin v. Smith*, 5 Minn. 297; *Neff v. Pennoyer*, 3 Sawy. 298; *O'Dell v. Campbell*, 9 Or. 298; *Trullinger v. Todd*, 5 Or. 36; *Mining Co. v. Court*, 18 Nev. 21; *Swain v. Chase*, 12 Cal. 285; *Wortman v. Wortman*, 17 Abb. Pr. 70; *Easterbrook v. Easterbrook*, 64 Barb. 421.)

Dolph, Bellinger, Mallory & Simon, and *Gearin & Gilbert*, for Respondents.

LORD, C. J.—This was an action in ejectment to recover lot 8, in block 183, in Couch's addition to the city of Portland, Oregon. The plaintiff bases his right to recover upon the invalidity of certain proceedings in a foreclosure suit, which, he claims, rendered the decree therein void. That suit was for a foreclosure of a mortgage executed by the plaintiff Pike and his wife to Klosterman Brothers, upon the property sought to be recovered in this action. It is admitted that if the decree is void, the title to the land in controversy never passed out of the plaintiff by force of that proceeding, and that he is entitled to recover in the present action.

The invalidity insisted upon arises out of an order for the publication of a summons, and the specific objections are: (1) That it does not appear from the affidavit upon which the order of publication was based that the defendants had any property in

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the State of Oregon. The provisions of the Code as to this requirement are found in section 55, subdivision 3, and section 56 of Deady's Code. The affidavit shows that the plaintiff Pike and his wife, to secure the payment of a certain note, particularly described, executed a mortgage to Klosterman Brothers upon "lot 8, in block 183, in Couch's addition to the city of Portland, in Multnomah County, Oregon," the property described in, and for which the present action is brought. These facts show, so to speak, by the mouths of Pike and wife, as alleged in the affidavit, that they did have property in the State, and had voluntarily created a lien upon it, and they agreed that if the debt secured by the mortgage was not paid when due, that the realty described might be sold in discharge of the indebtedness. In *Belmont v. Cornen*, 82 N. Y. 257, the affidavit for an order of publication in a foreclosure suit, as here, was as follows: "That this action is brought to foreclose a mortgage made and executed by the said defendants, Peter P. Cornen and Lydia, his wife, to the said plaintiff, to secure the sum of sixty thousand dollars, with interest, on real property in the city and county of New York, in this State." The facts alleged in the affidavit show that the realty mortgaged was situated within the State, and that the suit to foreclose the lien upon it was brought by the parties to whom the mortgage was originally given against *those only* who gave it—by Klosterman Brothers as plaintiffs and mortgagees against Pike and wife as defendants and mortgagors—and as no third person was disclosed as a party by virtue of ownership of the *res* subject to the mortgage, it necessarily appeared by the facts alleged in the affidavit that the defendants Pike and wife still owned the realty within the State, which they had mortgaged to the plaintiffs Klosterman Brothers, when the foreclosure suit was instituted, and when the affidavit for the order was made. (2) The second objection is more serious and difficult of disposal. It is, in effect, that it does not appear from the affidavit that the defendants could not be found within the State, or that any diligence had been used to ascertain their whereabouts, or where they were at the time the affidavit for the order of publication was made.

Our Code provides that "when service of the summons cannot be made, as prescribed in the last preceding section, and the defendant, after due diligence, cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, . . . such court or judge thereof shall grant an order that the service be made by publication of a summons, in either of the following cases: (3) When the defendant is not a resident of the State," etc. (Deady's Code, p. 116, § 55.) This provision is like section 139 of the New York Code, from which it was taken. The construction of this provision of our Code has been the subject of much judicial discussion, and its meaning is not clearly expressed.

In an early case (*Vernan v. Holbrook*, 5 How. Pr. 4), Parker, J., said: "The proceeding is authorized, when it shall appear that the defendant, after due diligence, cannot be found within this State. The meaning of this section is not clearly expressed, but I do not think it was intended that an attempt must be first made to serve process where the defendant is a non-resident. The fact of non-residence is evidence that the defendant could not, after due diligence, be found within the State; and so it was held in *Rawdon v. Corbin*, 3 How. Pr. 416." But in *Wortman v. Wortman*, 17 Abb. Pr. 70, it was held that the fact of non-residence of the defendant is insufficient to authorize an order for the publication of a summons, Sutherland, J., saying "that it must appear by affidavit, to the satisfaction of the court or judge, that the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State; for the section of the Code containing such requirement assumes that, though the defendant be a non-resident, yet that, perhaps, he may be found within the State, and plainly contemplates that some effort shall be made to find and serve the defendant within the State, though he or she be a non-resident." This case decides specifically that non-residence of the defendant is insufficient, and does not dispense with effort to find the defendant within the State, and the later decisions adhere to this conclusion.

In *Carleton v. Carleton*, 85 N. Y. 314, the affidavit for an order of publication was as follows: "The defendant has not

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resided within the State of New York since March, 1887, and deponent is informed and believes that the defendant is now a resident of San Francisco, Cal." And the court, by Miller, J., said: "The appeal presented involves the question whether an affidavit showing non-residence, without proof where the defendant actually was at the time, makes out a case within the provisions of section 139, therein cited. The affidavit states that the defendant has not resided in the State for some time, and on information and belief, where he does reside. There is no statement, however, that due diligence has been used, or that any effort whatever has been made to find him, and that he cannot be found within the State. It is a simple allegation of non-residence, from which fact the court is asked to infer that due diligence had been used. The Code evidently meant to require proof that defendant could not be found after due diligence." He then proceeds to remark that the proof furnished does not establish such diligence; that it is a well-known fact that many persons who are residents of one State have places of business in another, and that they are frequently in the latter State, pass most of their time there, and could be readily found, if due diligence was used for that purpose; that non-residence of itself is not a sufficient ground for granting the order, and that, therefore, the proof of the first alone furnishes no sufficient reason for the judicial conclusion, that due diligence had been employed to find the defendant within the State. Judge Miller then proceeds to make this distinction: "Cases," he says, "may arise where the proof of residence in the distant State at the very time, and of an absolute location there, would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defendant was at the time not only a resident of the State of California, *but was then actually living in that State*, there would be ground for claiming that due diligence would be unavailing. But the affidavit is not specific and certain as to the fact that the defendant ever, although a non-resident, might not be found within the State by the use of due diligence, and hence was sufficient to confer jurisdiction."

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The italics are mine, and intended to note that in the opinion of the court, proof as to where the non-resident defendant actually was at the time would excuse any effort to serve at another place. In *Kennedy v. The N. Y. L. Ins. & Trust Co.* 101 N. Y. 488, the court, by Miller, J., had occasion again to examine this subject, and to re-examine the views expressed in *Carleton v. Carleton*, *supra*, and said: "It will be seen that in the case cited (*Carleton v. Carleton*), the affidavit as to residence is upon information and belief, and does not show positively and distinctly that the defendant was a non-resident." Considerable stress is laid upon this fact, and in the opinion it is said: "Cases may arise," etc., quoting what we have last quoted from that opinion, and then concludes the review of that case as follows: "It would thus seem that where the proof of non-residence is clear and conclusive, and that the defendant is living out of the State, and in a distant State, there may be strong reasons for holding that proof of due diligence is not required, and a different result arrived at."

These are the latest authoritative expressions of the court upon the subject-matter under consideration, and the result reached may be thus summed up: That the statute requires proof that the defendant cannot, after due diligence, be found in the State, or proof of such a state of facts as will show that diligence would be of no avail in effecting a service within the State.

The affidavit in the case now under consideration is as follows: "That said defendants reside at Walla Walla, in the Territory of Washington, which is their postoffice address. . . . that personal service cannot be made upon said defendants or either of them, for the reason that said defendants have departed from this State, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla." As we have seen, non-residence is not of itself sufficient to authorize the order for publication, because that alone is not inconsistent with the idea that the defendant may be in the State doing business, although his residence is in another State, and hence, would not relieve of the necessity or requirement of due diligence. But the allegation of non-residence, in connection with the facts additionally alleged,

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that he was actually living in the resident State, would be ground for claiming that due diligence would be unavailing.

The allegation of non-residence is specific and certain in the affidavit—the defendants reside at Walla Walla, Washington Territory, and that is their postoffice address. But this is not enough, and the inquiry now is, whether the further statement, taken in connection with the averment of non-residence, “that personal service cannot be made on the defendants for the reason that they have departed from the State, and remained absent therefrom for more than six consecutive weeks, and *now* reside at Walla Walla,” show such a state of facts as renders it apparent that no act of diligence would be of any avail to find them within the State. It seems to me that these averments, taken together, are legal evidence, tending to show, at least, not only non-residence, but actual absence from the State at the time when the affidavit was made. The word “now,” in its ordinary acceptation, means “at this time,” or “at the present moment,” or “at a time contemporaneous with something done.” It relates to the actual existence of the fact at the time and place mentioned.

The averment that the defendants “now reside at Walla Walla,” means at this time, or at the present moment they live or reside at that place; that is to say, that when the affidavit was made, they were then actually living in Walla Walla. It is intended to emphasize the fact of actual presence at the place of residence, at the time alleged, and is the reason why the affidavit says that personal service cannot be made upon them within the State. When taken together, these averments show, positively and distinctly, that the defendants were not only residents of Washington Territory at that time, but that personal service could not be made on the defendants in this State, because they had left the State, and were then and at that time residing in Walla Walla. Here, then, the proof shows where the defendants were at the time the affidavit was made for the order, the identical matter which was wanting in the affidavit in *Carleton v. Carleton*, *supra*, and was thus fatal to its sufficiency.

The law requires proof that the defendants cannot be found after due diligence, or proof of such a state of facts as show that

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diligence could avail nothing to effect service upon them within the State. When proof of such a state of facts is made to appear to the satisfaction of the court or judge, within the principle and reasoning of the cases cited, the purpose of the law is answered, and its requirements observed. It may be admitted that the affidavit is illy constructed, and upon appeal, might be subjected to some criticism; but if it is not entirely defective, the order upon which it is based should certainly not be set aside in a collateral proceeding. The rule upon this subject is thus stated: "When the proof has a legal tendency to make out a proper case in all its parts for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose." (*Miller v. Brinkerhoff*, 4 Denio, 118; *Staples v. Fairchild*, 3 N. Y. 41, 46.)

We find no error, and the judgment of the court below is affirmed.

[Filed November 21, 1887.]

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A. S. KIMBALL, RESPONDENT, v. JOHN MOIR ET AL.,
APPELLANTS, AND THE DUNDEE MORTGAGE AND
TRUST INVESTMENT COMPANY, RESPONDENT.

ATTORNEY'S FEE IN A PROMISSORY NOTE.—A provision in a promissory note for a stipulated attorney's fee of ten per cent upon the amount found due is of no legal effect, and the court will not enforce it.

MODIFIED ALLOWANCE—OFFER TO PAY.—The court will not modify the amount and then enforce it as modified, except so far as offered or admitted by the defendants.

APPEAL from Multnomah County. Modified.

McDougall & Bower, for Appellants.

Dolph, Bellinger, Mallory & Simon, for Respondent A. S. Kimball.

Whalley, Bronough & Northup, for Respondent The Dundee M. & T. I. Co.

STRAHAN, J.—There is but a single question presented by this appeal, and that is whether or not this court will enforce an

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agreement in a promissory note to pay ten per cent on the amount due, as attorney's fees, in case of suit thereon. The amount due on the note, principal and interest, at the date of the decree was \$5,080, and the amount of attorney's fees allowed in the court below was \$508. In *Balfour v. Davis*, 14 Or. 47, we had occasion to consider the effect of inserting in a note a fixed percentage, payable as attorney's fees, in case of suit thereon, and declined to enforce it or give it any legal effect. In referring to the case of *Peyser v. Cole*, 11 Or. 30, it was said: ". . . We do not feel disposed to extend the doctrine there announced beyond the precise question then before the court." To allow the attorney's fees in this case would be a departure from the doctrine thus announced.

We further held, in effect, in *Balfour v. Davis*, *supra*, that when the parties had fixed the amount of attorney's fees in a note which was unconscionable and unreasonable, we would not undertake to partially enforce the contract, by fixing such sum as we might deem reasonable. If a party wishes to indemnify himself for attorney's fees in case of suit upon a promissory note, he may do so by providing therein for a reasonable attorney's fee. It is not practicable, nor is it consistent with sound public policy, to allow parties at the inception of a transaction of this nature to determine the amount of attorney's fees to be paid in case of default. It is impossible for them to know at that time the extent or value of the services to be rendered. In such a case they will always be placed at the highest possible limit, and the defendant may show their unreasonableness, if he can. Some of the authorities hold that the insertion in a note of a fixed percentage as attorney's fees, in case of suit, is to be regarded as a penalty, from which the court in giving judgment may vary according to the circumstances of the particular case. But such is not the nature of the transaction, nor was it the intention of the parties. It is a liquidated sum, to be paid, at all events, if suit is brought. I think if such a contract is good for any purpose, it must be enforced as the parties made it; and therefore, for the reasons stated in *Balfour v. Davis*, *supra*, we refused to modify and then enforce it as modified. But on the other hand,

Points decided.

if a contract provides for a reasonable attorney's fees, the court, when called upon to enforce it, as soon as the extent of the services rendered by the attorney is ascertained, has knowledge of their value, and can always make the proper allowance without the possibility of unfairness or abuse. If necessary, the parties could also offer evidence on the subject to assist the court in reaching a conclusion as to the value of such service.

It appears from this record that the plaintiffs offered evidence tending to prove the reasonableness of the attorney's fees claimed. This evidence could not be considered without wholly ignoring the terms of the contract that had fixed the amount, and such evidence was clearly irrelevant. We perceive no rule-consistent with sound legal principle that will partially recognize the validity of such contracts, and hence, in *Balfour v. Davis, supra*, we refused altogether to enforce such a contract, and to that we adhere.

Let the decree be modified as to attorney's fees, except as to the amount offered or admitted by the defendants, and affirmed in all other respects.

[Filed November 21, 1887.]

JOHN KELLER, RESPONDENT, v. E. BLEY, APPELLANT.

STATUTES OF FRAUD—CONTRACTS, WRITTEN—VERBAL MODIFICATIONS OF.—The statutes of this State make a contract not to be performed within one year from the making thereof void, unless the same is in writing. *Held*, in an action where a written contract had been modified by a verbal agreement, which verbal agreement was not to be performed within one year, that oral evidence was admissible, in an action thereon, in order to give an understanding of the surrounding circumstances.

ASSUMPSIT—EVIDENCE, HEARSAY.—In an action for the value of some tools sold, a list of the tools made by a person whose only knowledge of its correctness was hearsay, was offered to show their value. *Held*, the court properly refused the testimony.

JURY—VERDICT OF—VIEW OF PREMISES BY—MISCONDUCT OF ATTORNEY.—The jury with the consent of the parties went to view the premises where the work sued for was done. The attorneys stipulated that one attorney on each side should accompany the jury. Two of the plaintiff's attorneys went in the company of the jury, but had no communication with any of them. Besides these two, one other of the plaintiff's attorneys, with an attorney of the defendant,

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went in sight of but were not in company with the jury. *Held*, on motion to discharge the jury, that as the court below had a better opportunity to judge of the motives of the attorneys in mingling with the jurors, the denial to discharge them should be sustained.

JUROR, MISCONDUCT OF.—A juror who went with the others to view the premises, and did not go over the same on account of lameness, but was in sight thereof, was not guilty of misconduct.

APPEAL from Multnomah County. Affirmed.

E. Mendenhall, F. B. Jolly, A. F. Sears, H. E. McGinn, and N. D. Simon, for Respondent.

F. V. Drake, and McDougall & Bower, for Appellant.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Multnomah. It appears from the transcript that the respondent brought an action against the appellant in said Circuit Court, counting upon three several causes of action. The first cause was upon a contract of sale of certain tools, for the alleged price of \$380, upon which he admitted a payment of \$25. The second one was for work and labor performed by respondent for the appellant, alleged to have been of the agreed value of \$29; and the third one was for work and labor upon a certain written contract, and subsequent parol modification, to clear and grub a tract of 35 acres of land, and to cut into cord-wood all fallen timbers thereon, and all timbers he should cut down in clearing the tract. Said contract contained the mutual agreements of the parties, and the respondent alleged in his complaint, in reference thereto, that he performed the same on his part; that he provided himself with over \$400 worth of tools and apparatus to be used in said work, and was progressing therewith, and in compliance with the terms and conditions of the contract, when the appellant refused to comply with his part of it; that he cleared a portion of the tract, and cut into cord-wood 282 cords of wood from the timber referred to; that the clearing at the contract price amounted to \$1,112.50, and the cutting of the cord-wood to \$352.50, which sums were, respectively, the reasonable value of the work; that the appellant had paid thereon the sum of \$746, leaving unpaid

a balance of \$719, which the appellant agreed to pay respondent on demand, and the latter agreed to accept in satisfaction thereof the sum of \$662.50, and to remove from the premises, and did remove therefrom; that he had frequently demanded payment of said sum of \$662.50, but the appellant had failed to pay any part of it. This sum, with the two other claims, amounted to \$1,046.50, which he demanded judgment for.

The appellant denied the first cause of action. He admitted the second one, but denied the value of the work, and denied the parol modification of the written contract as alleged. He also denied that respondent was progressing with the work, and in full compliance with the terms and conditions of the contract, when the former refused to comply with his part of it; denied that the respondent cleared the amount of land alleged, or that he cut the 282 cords of wood; denied the value of the work as alleged by the respondent, or that he agreed to pay therefor, or that the respondent agreed to accept, in full satisfaction thereof, the sum of \$662.50, or any sum.

And for a further answer, after admitting that the parties modified the terms of the written agreement so far as cutting the wood was concerned, alleged that by the terms of such modification the respondent was to cut all the best wood at the rate of one dollar a cord; that respondent entered upon the performance of the agreement, and did work in clearing, worth, in the aggregate \$450, and cut 108 cords of good wood, and 133 cords of rotten, unsound, and unmarketable wood, which was wholly worthless; that respondent so unreasonably delayed the performance of the contract on his part that he gave him notice to quit the premises, and finally put him out by proceedings of forcible entry and detainer, and respondent wholly abandoned the work; that appellant paid him the sum of \$738; that respondent did not complete the work in time for a crop as provided in the written contract, and so unskillfully and in such an unworkmanlike manner performed the clearing and the cutting of the wood, that appellant was damaged in the sum of \$50, and by reason of the delay, in the sum of \$150.

The bill of exceptions shows that respondent gave evidence

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at the trial tending to show that the first and third causes of action were an account stated, and of his performance of the work, and the appellant's refusal to comply with the contract upon his part; that the appellant gave evidence tending to show that some of the wood cut was unsound, and decayed, and that the land claimed to have been grubbed was full of hidden stumps; that it would cost a considerable sum of money to clear it in accordance with the contract, and that the use of the land for a crop would have been worth fifteen dollars an acre if it had been properly cleared. It further appears from the bill of exceptions that after the oral testimony had been produced, upon request of respondent and consent of appellant, the jury impaneled to try the issues were allowed to view the premises upon which the work had been done. Before retiring they were properly instructed by the court, and a special bailiff appointed to accompany them and point out the premises, and were put in charge of a regular bailiff of the court. That the jury proceeded to view the said premises accordingly, and the next morning appeared in their proper places in court; and the case being ready for further proceedings, counsel for the appellant moved the court that the jury be discharged from the further consideration of the cause, and that it be set for hearing before another jury, upon the grounds that there had been misconduct on the part of the jury upon the occasion of the view, and that two of the counsel for the respondent had conducted themselves improperly on said occasion, which misconduct consisted in the fact that Chris. Nolan, one of the jurors, did not go onto the premises with the other jurors, but remained separate and apart from them, and that two of the respondent's attorneys had, during the view, accompanied and mingled with the jury, and had made communications with them concerning the cause or matters connected with the case; whereupon the court made a summary investigation of the charges, and found the fact to be that it had been stipulated among the attorneys that one attorney on each side should accompany the jury on the view, but that by some misunderstanding, three attorneys on behalf of the respondent had accompanied the jury, and one attorney for the appellant;

that Drake and Sears went together, and were not in company with, but were in sight of the jury; that two of counsel for respondent walked over the premises, mingling with or being near to the jury; that no conversation with the jurors was had, and no communications were made by them, or either of them, to the jury during said view; that the juror Chris. Nolan, by reason of lameness, was unable to walk over the premises, but remained in a carriage on the highway alongside of, and in view of the greater portion of the premises; thereupon the court overruled the said motion, to which ruling said counsel excepted.

Several exceptions were taken to the admission of testimony, also to the refusal to admit testimony, and to the charge of the judge to the jury. The case involved, mainly, questions of fact, of a character which a jury were peculiarly suited to determine.

Proof of verbal alteration of contract. It is claimed by the appellant's counsel that the court erred in allowing evidence of the verbal alterations of the written contract. He contends that the contract was not to be performed within a year after the alleged verbal agreement adding conditions to it, and that the latter comes within the Statute of Frauds. That cause of action, as I understand it, was not to enforce the contract, but to recover for work and labor, upon a promise to pay for the same. Proof of the contract was a circumstance in the particular case, was a part of the general facts, and the proof was merely to give an understanding of the circumstances connected with the affair. It is only when an agreement is sought to be enforced in accordance with its terms that the objection to its invalidity upon such a ground can be raised. If the work had all been done under a void contract, it would not prevent a party from recovering its value, though he would not be entitled to recover damages for the breach of the contract. A verbal contract to do work which, by its terms, is not to be performed within one year, is void; but if the parties treat it as valid until after a part of the work is done, it cannot then be avoided so as to avoid payment of the reasonable value of the work that has been performed. The law, in such case, will imply a promise to pay for work, or other valuable thing obtained under such an agreement, although

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the terms of the agreement cannot be enforced in a court of justice.

Evidence as to tools. Said counsel also claims that the court erred in admitting evidence as to what tools respondent got, in order to perform the contract. This evidence was clearly immaterial under the issues of the case, except so far as it tended to prove what the respondent had done in the performance of labor. If it had been offered and received for the purpose of charging the appellant with the expense of the tools, it would have been erroneous, but I do not understand that it was offered for any such purpose; there is a count in the complaint for tools sold, but this evidence was not offered to prove that count. The counsel makes a point upon the court's refusal to admit a list of the tools offered by him to rebut the evidence of the value of the tools. The respondent claimed pay for them in the latter count, but I do not think that a production of a list of the tools would prove their value. The question was, what were they worth? A schedule of them would prove nothing, and could not be used except as a matter of convenience. The counsel claims that it would have shown the improbability of the appellant having offered to pay the amount therefor claimed by the respondent in the complaint. In order to show that, it was not necessary a list of the tools should be made out and given in evidence. Besides, it appeared that the list was made by a person whose knowledge of its correctness was only hearsay.

The court has considered the other exceptions alluded to, and deems them untenable. And I do not think it necessary to refer to them particularly.

Misconduct of counsel. The exception, however, to the ruling of the court upon the motion to discharge the jury is entitled to more consideration. I attach no importance to the fact that the juror Nolan did not go on the premises. He went to a place where he could view them, and had a good excuse for not walking over the land, and as long as he did not intend to disregard his duties as juror, his verdict cannot be impeached. If he had failed to view the premises through a designed indifference as to what might have been ascertained, he would probably have been

chargeable with such misconduct as would have required the granting of a new trial. But the act of the two counsel, "who walked over the premises, mingling with, or being near to the jury," is a different matter. I cannot see that they could have had any excuse whatever for being where they were. It was highly improper, and could not fail to leave the impression that their object in mixing in with the jury was to influence them to favor their side of the case. It left a very strong impression that their purpose was to ingratiate themselves into the confidence and good-will of the jury, and practice cunning and artifice to bias their minds. Nor would any protest on their part that it resulted from accident, or thoughtlessness, be likely to be received in extenuation of their conduct. Such occurrences are not apt to arise except by design. It is needless to say that they are wrong, and merit severe rebuke. Every sense of propriety and instinct of common decency condemns such performances.

Any attempt upon the part of an attorney to gain an underhanded advantage over the opposite party in a lawsuit, in any manner, is disgraceful, and when it consists in an effort to tamper with a jury, in the slightest degree, it is infamous. If such practices were to receive the least countenance from the court, and encouragement from the bar, they would soon grow into such a monstrous evil that it would corrupt the fountain of justice. An attorney has no right to regard a lawsuit as a scramble to obtain a favorable decision, nor to adopt unscrupulous means to accomplish any such ends. Such a course is not only a violation of the duty enjoined upon him by the law, but is dishonest and nefarious *in se*, and will always be despised by honest people. It secures a following, but it is necessarily of that class who deal in knavery, and who regard a retainer of an attorney as an employment to do all kinds of dishonorable and dirty work.

I think that the court, when the matter was brought to its attention, and it was ascertained that two of the respondent's counsel "walked over the premises, mingling with or being near the jury," unless there was a reason beyond what we can see, should have promptly set aside the panel, and taxed the respondent with the disbursements incurred by the appellant on account

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of the trial. The latter was injured in his defense in consequence of the affair. His counsel, in bringing the matter to the attention of the court, did right; such things should not be allowed to pass unchallenged. But the course taken no doubt prejudiced the client's defense. I have witnessed the trial of too many law-suits to believe that such a digression in the proceedings would not have that effect. The court's finding, that no conversation with the jurors was had, and no communications made by the two counsel, was hardly a sufficient reason for denying the motion; it did not find that said counsel had any excuse for being where they were, nor that they did not employ arts and insinuations calculated to induce a belief in the minds of the jury that the respondent had done the work well, which it might reasonably be inferred was their purpose in being on the ground. Besides their presence upon that occasion gave rise to a suspicion that justice was not being fairly administered, and tended to incite a general belief that the law is lax and ineffectual in the adjustment of controversies between parties, a sentiment that is in contravention of the public good. And again, it is not always a decisive question, in such cases, whether the conduct that is objected to did injure or not. The language of the authors in Thompson and Merriam on Juries expresses the view I am endeavoring to put forth, which is as follows: "But where the successful party to the suit is shown to have attempted, by improper means, to influence the verdict in his favor, whether by corrupting or intimidating particular jurors, by arousing prejudice in their minds against the opposite party or his cause, or by undue hospitalities or civilities, the verdict will be set aside, on grounds of public policy, as a punishment to the offender, and as an example to others, without reference to the merits of the controversy, and without considering whether the attempt was successful or not." (Rule 3, § 348.) Were the question here involved before this court as an original question, we should unhesitatingly determine it as before indicated, and we regret that the Circuit Court did not find it consistent with its view to pursue that course.

The question, however, is one in which the trial court has a

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better opportunity to judge of the motives of the parties, and there is a possibility that the counsel referred to might have been in company with the jury with no purpose to influence their determination. The parties were before that court, and it had a better opportunity to ascertain the incidents and surroundings of the transaction than this court has, and for that reason we have been inclined to defer more to its decisions upon such questions.

In view of the latter considerations, we feel constrained to affirm the judgment appealed from.

[Filed November 23, 1887.]

J. H. OATMAN, RESPONDENT, v. A. G. EPPS, APPELLANT.

EQUITY—APPEAL.—Error in sustaining a demurrer to a complaint in the nature of a cross-bill filed by a defendant in an action at law cannot be inquired into upon an appeal from the judgment recovered in the law case. The proceedings at law should have been disregarded by the defendant, and the appeal taken from the decree in the equity case.

SAME—COMPLAINT IN THE NATURE OF A CROSS-BILL—EFFECT OF FILING—PRACTICE.—When a defendant in an action at law files a complaint in the nature of a cross-bill, asking equitable relief, he institutes a suit which must be determined before any further proceedings in the law action can be had. The practice in such cases should be liberal. If it is necessary to a proper adjudication that a third person be made a party, the court should require this to be done, not dismiss the complaint.

APPEAL from Jackson County. **Affirmed.**

W. R. Andrews, for Appellant.

The appellant was in possession of the premises at the time respondent acquired his pretended title, and demand was necessary. (*Wright v. Lewis*, 13 East, 210; *Doe v. Jackson*, 1 Barn. & C. 448; *Dennis v. Wardner*, 3 Mon. B. 173; *Stakehouse v. Doe*, 5 Blatchf. 570; *Costigan v. Wood*, 5 Cranch C. C. 507.)

H. K. Hanna, for Respondent.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Jackson. The respondent

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commenced an action in that court against the appellant to recover the possession of certain real property, alleging in his complaint that he was the owner thereof in fee, and that the appellant wrongfully withheld the same from him. The appellant filed an answer to the complaint, denying the respondent's ownership of the property, and also filed a complaint in equity in the nature of a cross-bill, as provided by the Code. The respondent demurred to the complaint, and the court sustained it, and dismissed the complaint. The proceedings in the action at law were then taken up, and finally resulted in the respondent recovering a judgment against the appellant to the effect that he was entitled to the possession of the property, from which judgment the appeal was taken.

The object in taking the appeal was to obtain a review of the decision of the Circuit Court upon the demurrer to the complaint in equity. The counsel for the appellant was led to believe, I suppose, that the decision could be reviewed as an intermediate order, involving the merits and necessarily affecting the judgment, and he specified the said decision as a ground of error. But an examination of the Code will show that when such complaint is filed it stays the proceedings at law, and the case thereafter proceeds as a suit in equity, and in which said proceedings at law may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree. The effect of filing such a complaint is the commencement of a suit in equity, which subordinates the proceedings at law, until the relief arising out of the facts requiring the interposition of a court of equity, and material to the defense in the action at law, is obtained.

The proceeding is wholly independent of and separate from the proceedings at law, although its object is to obtain relief that can be made available as a defense to the law action; not by way of plea or answer, but through the plenary power of the court, sitting as a court of equity. For instance, A commences an action against B to recover the possession of real property. The former has the legal title to the property, while the latter has the equitable title to it, but cannot assert it in the law

action; he therefore files a complaint in equity, with his answer at law, to obtain a decree that the legal title be conveyed to him, or that his right be determined, and that the plaintiff in the law action be enjoined from proceeding therein. By that means a defendant in an action at law may have the benefit of an equitable defense, and the two procedures, law and equity, be kept separate and distinct.

When a defendant in a law action files such a complaint, he institutes a suit which must be determined before any further proceedings in the law case can be had; and if he is unsuccessful in the Circuit Court in his equity case, and desires that a review of the decision of that court be had in this court, he must appeal the same as in the other equity suit. He has no occasion to look after the action at law until he exhausts his efforts to obtain the equitable relief sought. The former remains dormant during the interval, and cannot be pursued until the latter is finally terminated. But he cannot wait until the law action is tried, and by appealing from the judgment therein have the decree in the equity case reviewed. The judgment at law and the decree in equity are entirely distinct, and cannot be grouped together, as the mode of review of the two may be entirely different; one comes here upon pure questions of law, the other may come on a question of fact, and the review be a trial *de novo*.

Some matters were discussed at the hearing which we are not required to consider, but we would suggest that the practice in cases of this character ought to be liberal. A technical view in such cases serves no purpose, except to deny a party justice, or at least, impress him with a belief that he has been unfairly dealt by. It would have been much more in consonance with equity in this case to have retained the complaint filed by the appellant, and ascertained whether or not the allegations contained therein were true. If they were true, the appellant was clearly entitled to relief; it would have been a denial of justice to hold otherwise. If the fact of Jane Epps not being a party to the litigation interfered with or embarrassed the adjudication of the rights of the parties, the court should have required that

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she be brought in and made a party. Equity is no narrow, cramped affair. It is expansive in its nature, and adapts itself to all manner of complications.

It is said that when Chancellor Kent entered upon the discharge of the duties of chancellor of the State of New York, he threw the doors of his court wide open. He changed the stinted policy that regarded formalities and niceties into a broad system of jurisprudence, extended it so as to afford a practical and efficient remedy in all cases where the common-law remedy was inadequate and incomplete. By such a course he conferred a lasting benefit upon all English-speaking people, while if he had contented himself in haggling over trifling doubts, and in making hair-splitting distinctions, his reputation as a jurist would never have been known beyond the limits of his own State, or remembered by an after generation.

The errors alleged in the proceedings in the law case are untenable, and those in the equity proceeding cannot, for the reasons mentioned, be considered.

The judgment appealed from must therefore be affirmed.

15	440
36	552

[Filed November 23, 1887.]

CHARLES PUTNAM ET AL., APPELLANTS, v. WILLIAM S. WEBB, RESPONDENT.

EQUITY — WHEN RELIEF GRANTED IN.—A judgment was obtained before a justice of the peace in an action for the recovery of personal property. Judgment was entered for the return of the property, but the justice omitted the alternative part of the judgment as to value, in case a delivery could not be had. The defendant in that action appealed, and then dismissed his appeal. The appellate court failed to enter judgment at the time of the dismissal. Subsequently the justice of the peace corrected his docket, and entered judgment for the value of the property. The appellate court also entered a final judgment in the case for the property, or its value. The defendant now seeks to enjoin the enforcement of the judgment. *Held*, he has no standing in a court of equity until he has complied with that portion of the judgment against which no complaint is offered.

JUDGMENT, ERRONEOUS — MUST BE CORRECTED BY APPEAL.—If a judgment of the Circuit Court is erroneous, the proper remedy is not through a court of equity, but by appeal from the judgment. (Hill's Code, § 535.)

Opinion of the Court—Strahan, J.

APPEAL from Klamath County. Affirmed.

Cogswell & Cogswell, and *Warren Truitt*, for Appellants.

P. P. Prim, for Respondent.

STRAHAN, J.—This is a suit in equity to enjoin the enforcement of a judgment of the Circuit Court of Klamath County. It appears from the transcript that in May, 1883, the respondent commenced an action of replevin before a justice of the peace of Linkville precinct, against Charles Putnam, who was then sheriff of the county, to recover the possession of a mare of the value of two hundred dollars. That such proceedings were thereafter had in said action, that the plaintiff recovered a judgment therein for the possession of said mare, or two hundred dollars, the value thereof, in case delivery could not be had; but the justice failed to enter in his docket the alternative part of said judgment at the time, but entered it simply for the recovery of the mare. The defendants appealed to the Circuit Court, but voluntarily dismissed their appeal. By some oversight, said Circuit Court failed to enter final judgment in favor of the respondent in the appeal at the time the same was dismissed. Thereafter the justice, of his own motion, wrote in his docket the alternative judgment, not in precise technical form but substantially. Subsequently the Circuit Court entered a final judgment therein for the recovery of the mare, or two hundred dollars, the value thereof, in case delivery could not be had; and this is the judgment which the plaintiff seeks to enjoin by this proceeding.

1. The case made by the complaint is without equity. Here is the judgment of two courts that the plaintiffs have wrongfully taken and detained the defendant's mare, and awarding a return thereof: Until this judgment, as to the return of the mare, is complied with, or some good and sufficient reason shown for not complying with it, the plaintiffs shall not be heard to complain of the entry of the alternative judgment. Until he complies with, or performs so much of the judgment as is admitted to be rightful, he shall not be allowed to complain of the other part of it. "He who seeks equity, must do equity."

Points decided.

2. It is claimed that the Circuit Court erred in entering the judgment sought to be enjoined. If it be conceded that the entry of this judgment was erroneous, it would not follow that the error could be corrected by a suit in equity. An appeal is the proper remedy in such case, and it would seem the only proper remedy. (Hill's Code, § 535.) We do not, at this time, enter into the question as to whether the action of the justice in attempting to correct his errors in the manner described was regular or not, nor as to whether there was error in the judgment of the Circuit Court.

In the view entertained by the court, these questions are not now material. The plaintiffs show no equity to enable them to attack either of said judgments. The decree will be affirmed.

LORD, C. J., concurring. — The admitted facts upon this record are fatal to the relief sought. The plaintiff knew of the error or defect of which he now complains, and seeks relief by injunction at the time of the entry of judgment in the original action, and his refusal to rely upon this defect by the voluntary dismissal of his appeal, deprives him of the right now to be heard in equity to contest on this ground the validity of the judgment. In this view it is not necessary to consider or determine what may have been the duty of a court of law in the premises, as his knowledge and subsequent conduct in refusing to avail himself of a remedy at law, to which he had resorted, is a bar to the relief sought. The bill was properly dismissed.

[Filed November 25, 1887.]

WILLIAM. J. PAUL, APPELLANT, v. LOUIS LAND,
RESPONDENT.

CHATTEL MORTGAGE — JURISDICTION — TRUST. — The necessity of taking an account, and the matter of trust and confidence between the parties, are sufficient to give a court of equity jurisdiction of the suit, and the real estate mortgage is so connected with the transaction that it could not be separated from the chattel mortgage.

ACCOUNT — HOW TAKEN. — In taking an account between parties, the court will examine the entire account submitted in evidence, and adjust the same according to the rights of the parties.

Opinion of the Court—Strahan, J.

APPEAL from Klamath County. **Reversed.**

H. K. Hanna, for Appellant.

P. P. Prim, for Respondent.

STRAHAN, J.—The object of this suit is twofold: *First*, to have a deed and certain bills of sale mentioned in the complaint declared mortgages; and *second*, to take an account of the amount due the plaintiff thereon, and to obtain a decree of foreclosure for that sum. No objection is made to the jurisdiction of the court to foreclose these chattel mortgages; but aside from that, the necessity of an account and matters of trust between the parties are sufficient to give the court jurisdiction.

It is now conceded by both parties that these writings were intended to secure the plaintiff in advances made to the defendant by the plaintiff. There is, therefore, nothing remaining of the case, except to ascertain from the evidence the amount of the advances. It appears from the evidence that on the twenty-fourth day of May, 1883, the defendant Louis Land conveyed to the plaintiff an undivided one-half interest of his stock ranch in Poe Valley, on Lost River, in Klamath County, Oregon, for the price and consideration of \$2,750. Prior to this time he had mortgaged the ranch to one Webster to secure the payment of a large sum of money. That at the time the plaintiff purchased an undivided one half of said ranch, there was due on said mortgage between \$2,800 and \$3,000; that the same had been assigned to one Morrison, who had caused proceedings to be instituted in the Circuit Court of Klamath County, Oregon, for the purpose of foreclosing the same, and that said suit was then pending. On the same day that the plaintiff purchased his interest in the ranch, the mortgage thereon, and the note evidencing the debt secured, were assigned to him for the consideration of \$1,730.

In this accounting the plaintiff claims the entire sum secured by said mortgage, as well as the expenses of a foreclosure thereof. On the other hand, the defendant claims that the mortgage was temporarily kept alive after the assignment to the plaintiff as a

Opinion of the Court—Strahan, J.

matter of convenience; but that the \$1,730 which the plaintiff paid to Morrison when said mortgage was assigned was in fact so much money advanced for the defendant's use, and was the first payment made by plaintiff for the half of said ranch.

A careful consideration of the evidence lead us to believe that this version of the matter is the more reasonable and probable, under all the circumstances, and without reviewing the evidence leading to this conclusion, we have adopted it as the true one. This will exclude from the account the item claimed on account of the mortgage.

The following items claimed by the plaintiff appear to us to be proven by a preponderance of the evidence to have been furnished, paid, and advanced to and for the use of the defendant Louis Land, and with which he is chargeable in this case:—

Two checks for \$100 each.....	\$200 00
Interest at 10 per cent from October 28, 1882.....	101 99
Cash advanced for State lands ($\frac{1}{2}$).....	135 75
Interest at 10 per cent from May 30, 1883.....	60 70
Cash advanced at Land Office.....	3 00
Interest at 10 per cent from May 24, 1883.....	1 35
Cash advanced to G. T. Baldwin.....	81 00
Interest at 10 per cent since June 6, 1883.....	36 17
Cash paid for searching records in Yreka.....	5 00
Interest at 10 per cent from June 15, 1883.....	2 29
Cash paid for goods at Linkville, \$44.37 ($\frac{1}{2}$).....	22 18
Interest at 10 per cent from July 10, 1883.....	9 68
Cash paid for 124 head of cattle, \$1,869.62 ($\frac{1}{2}$).....	934 81
Interest at 10 per cent from October 30, 1883.....	380 16
Cash paid O. A. Stearns.....	3 00
Interest at 10 per cent from November 10, 1883.....	1 21
Cash by Reams & Martin, \$110 ($\frac{1}{2}$).....	55 00
Interest at 10 per cent from January 11, 1883.....	26 99
Cash for provisions, \$5 ($\frac{1}{2}$).....	2 50
Interest at 10 per cent from November 30, 1883.....	1 00
Cash paid for taxes, \$53 ($\frac{1}{2}$).....	26 50
Interest at 10 per cent from March 1, 1884.....	10 08
Cash paid W. C. Hale.....	9 31

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Interest at 10 per cent from September 29, 1884.....	2 90
Cash advanced to E. McElvey, \$36 ($\frac{1}{2}$).....	18 00
Interest at 10 per cent from March 1, 1884.....	6 71
Cash for fixing pistol and watch.....	7 75
Interest at 10 per cent from March 1, 1884.....	2 90
Cash paid to redeem land sold on execution.....	727 29
Interest at 10 per cent from January 29, 1884.....	278 08
Cash paid to redeem land sold on execution.....	548 25
Interest at 10 per cent from February 9, 1884.....	181 95
Cash paid for taxes and expenses, \$83 ($\frac{1}{2}$).....	41 50
Interest at 10 per cent from March 28, 1885.....	11 08
Cash paid for taxes, \$102.50 ($\frac{1}{2}$).....	51 25
Interest at 10 per cent from March 25, 1885.....	13 73
Amount of note.....	25 00
Interest at 10 per cent from October 6, 1881.....	15 54
Amount of note.....	70 00
Interest at 10 per cent from March 15, 1883.....	32 81
Amount of note.....	100 00
Interest at 10 per cent from May 24, 1883.....	45 00
Amount of note.....	200 00
Interest at 10 per cent from August 30, 1883.....	84 64
Amount of note.....	100 00
Interest at 10 per cent from November 24, 1883.....	40 00
Total.....	\$4,714 05

The purchase price of one half of the ranch referred to was \$2,750; from this sum must be deducted the amount paid by the plaintiff on the Morrison mortgage, \$1,730, which leaves a balance due on the farm of \$1,020. To this sum must be added interest at ten per cent from time of purchase, May 24, 1883, \$459, which added makes \$1,479, balance due defendant on the ranch. Deduct this sum from amount due plaintiff, and there remains due plaintiff on this accounting the sum of \$3,235.05, for which there will be a decree.

Equity does not do justice by halves. Its principles require the complete administration of justice between the parties before the court. Therefore, we have not hesitated in this case to

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examine the entire account submitted in evidence, and to adjust the same according to the real rights of the parties as they appeared to us, notwithstanding some items involved belong to the partnership of Land and Paul; but in such case we have only charged the defendant one half of the sum advanced by the plaintiff. We have seen proper to allow the defendant interest on the balance of the unpaid purchase money for one half the ranch, though the item was not specially claimed upon the trial; but he is manifestly entitled to it.

Annexed hereto is an itemized statement of the items claimed by plaintiff and disallowed:—

October 21, 1882, to one half of 500 tons of hay.....	\$500 00
December 7, 1882, to expenses to the ranch.....	50 00
March 15, 1883, to cash by Martin & Reames.....	180 00
May 24, 1883, to expenses in suit at Linkville.....	65 00
August 27, 1883, to expenses at Linkville at court....	50 00
July 5, 1883, to amount paid Nichols & Abell.....	250 00
November 30, 1883, to cash by Reames & Martin.....	100 00
November 30, 1883, to amount of attorney's fees claimed in Paul v. Land on foreclosure.....	721 00

Amount disallowed.....\$1,916 00

We do not give any direction as to the order in which the property is to be sold, or which shall be first sold. Usually in such case, equity would require that personal property should be sold first; but that question is remitted to the court below, for such directions as may be equitable upon the application of either party.

The settlement of these accounts, and the adjustment of the rights of the parties growing out of the several writings mentioned in the pleadings, are matters in which the parties are mutually interested, and as to which there might well be honest differences. We therefore direct that neither party shall recover costs against the other, neither in this court nor the court below, and that each party shall pay one half of the clerk's fees in each court.

Let the decree of the court below be reversed and a decree entered herein in accordance with this opinion.

Opinion of the Court—Thayer, J.

[Filed November 28, 1887.]

**H. P. GREGORY & CO., RESPONDENTS, v. NORTH
PACIFIC LUMBERING COMPANY, APPELLANT.**

MORTGAGEE OF CHATTEL—CONVERSION MAY BE MAINTAINED BY, WHEN.—It is not necessary that a chattel mortgage should have been foreclosed in order that the mortgagee may maintain an action for the conversion of the mortgaged property. Taking possession of the property by the mortgagee is sufficient to entitle him to recover against one having no title.

PERSONAL PROPERTY—PROOF OF CONVERSION OF.—The proof of the identity of the property in actions for a conversion thereof must be reasonably certain.

CHATTEL MORTGAGE MUST DESCRIBE WITH REASONABLE CERTAINTY.—The description of property in a chattel mortgage must be reasonably certain, or the instrument will be inoperative and void.

EVIDENCE.—In proceedings to foreclose a chattel mortgage, oral proof may under proper circumstances be resorted to, to show what property was intended to be affected by the instrument.

APPEAL from Multnomah County. Reversed.

Strong & Strong, for Appellant.

G. G. Gammons, and *A. F. Sears, Jr.*, for Respondents.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Multnomah. The respondents commenced an action in said court against the appellant, a private corporation, for the conversion of lumber. A jury trial was held therein, which resulted in a verdict in favor of the respondents and against the appellant, and upon which the judgment appealed from was entered. The proceedings had in the case, as shown by the transcript filed in this court, are as unsatisfactory as any I have met with. It is difficult to learn therefrom what the respondents sued for, or what their right of action, if they had any, was. They counted in their complaint upon a wrongful conversion of lumber; but for what kind, or amount, or what the value of it was, does not appear. The allegation is simply, that on or about March 12, 1884, their firm "were the owners of, and in possession of, a certain quantity of lumber then on the premises occupied by F. W. Lewis for mill purposes, on South First Street, in Portland, Oregon; that on March 12, 1884, the said defendant (appellant) unlaw-

fully converted and disposed of said lumber to its own use, to the damage of said H. P. Gregory & Co. in the sum of three hundred dollars." Then follows an allegation that H. P. Gregory & Co. sold and assigned their claims against the defendant to plaintiff. This is all that is disclosed in the complaint respecting the quality, amount, kind, or value of the lumber; and the respondents' claim of title is still more ambiguous.

It appears that on the seventeenth day of November, 1883, one F. W. Lewis executed to the firm of H. P. Gregory & Co. a chattel mortgage to secure the payment of a promissory note, bearing date of that day, and whereby Lewis promised to pay to the order of said firm \$1,991.10, three days from such date, with interest. The property included in the mortgage consisted in the main of the machinery and fixtures in and about the mill on the premises referred to in the complaint, which property was particularly described in the mortgage, and in the description of the property therein. After the description of said machinery and fixtures occur the following words: "Also lumber piled on said premises, being more particularly described as block 113, city of Portland." Subsequently some effort was made by the firm of Gregory & Co. to foreclose the mortgage, but what it was can only be gathered from the testimony given by the late Alfred S. Frank, who was a witness on a former trial of the case.

It appears from the testimony of G. G. Gammans, Esq., a witness on behalf of the respondents, that Mr. Frank testified on the former occasion that he was present at the sale had under said chattel mortgage upon the foreclosure thereof, March 12, 1884; that L. Therkluson, at the time of the sale, admitted that some of the lumber then on the premises was there November 17, 1883, the date of the execution of the chattel mortgage; that Frank also testified that the mortgage had been foreclosed, as provided by the terms contained in said mortgage, by authority given the sheriff of Multnomah County; that the sheriff so acted at the written request of the plaintiffs; that he testified that the lumber described in the chattel mortgage, or so much of it as remained on the premises March 12, 1884, was sold by

George C. Sears, sheriff, by authority of plaintiffs, and the same was purchased by plaintiffs; that possession was taken by George C. Sears, at the request of plaintiffs, under said mortgage prior to the said sale.

This testimony was elicited by questions to the witness Gammans, all of which were objected to by the appellant's counsel as incompetent, and on various other grounds.

W. R. Crump, another witness on the part of the respondents, testified that he was foreman of a planing mill for some six years; that he was in the employ of F. W. Lewis from June 1, 1883, until March, 1884, as foreman of his mill; that he was at F. W. Lewis' mill on South First Street, Portland, Oregon, about March 1, 1884, at the time of the sale under a chattel mortgage given by Lewis to H. P. Gregory & Co.; that there was at that time on the premises, used by F. W. Lewis adjoining said mill, lumber that was there on November 17, 1883.

In answer to a question to describe it as well as he could, and to state where, on said premises, it was, the witness answered: "Under the mill in the basement, and under the dry-house, about three thousand feet of ash, maple, and alder, mostly ash. In the second story of the mill about three hundred feet of black walnut. In the mill on the first floor from fifteen hundred to two thousand feet of clear fir. In the yard above the mill from four thousand to five thousand feet of second quality of cedar." The witness further testified that rough cedar was worth about twenty dollars per thousand, clear cedar about forty dollars per thousand, and other lumber in proportion, and that in his opinion all of said lumber was worth in market, on March 12, 1884, about two hundred dollars. The witness was asked what became of the lumber, and answered that he did not know; that it was on the premises when he left there.

On cross-examination the witness was asked in substance to state his reasons why he knew that part of the same lumber on the mill-yard was on there November 17, 1883; and by and through what marks, brands, or peculiarities he could or did identify the lumber on the yard on March 1, 1884, to be the same lumber that was there November 17, 1883. In answer

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thereto, he stated "that he was there in charge as foreman; that he had the lumber stored in the different locations, and none of it was likely to be moved or taken away, except under his directions; that he knew the lumber by its general appearance."

The witness was also asked if, between November 17, 1883, and March 1, 1884, Lewis sold and disposed of any of the lumber on said mill-yard; and if during the time he did not put on deposit lumber thereon. To which the witness answered as follows: "The ordinary use and replenishing of stock went on during the time, that it would be impossible to give an accurate statement as to the amount; that lumber was used as required, regardless of the time it was brought into the mill."

Said Therkluson was called as witness on the part of the respondents, and testified that he was manager of the appellant's corporation on March 12, 1884, and still was, and was authorized to superintend and manage all its business, and during all the time above referred to was so recognized. This testimony was elicited by the respondents in order, I suppose, to bind the appellant as to the admission of said witness, testified to by Mr. Frank.

The witness Mr. Therkluson was, however, called on the part of the appellant, and testified that at the date of the foreclosure of the mortgage, March 12, 1884, the respondents claimed an interest in or to the lumber in and about the mill and mill-yard, and attempted to sell the same, or their interest therein; that witness objected to said sale, and that no sale of said, or any lumber, was made under said mortgage on March 12, 1884.

The testimony I have here set out is, according to the bill of exceptions, "all the testimony concerning the sale of said lumber, and the purchase thereof by the respondents."

It is provided in the mortgage, that in case default shall be made in the payment of the note, or the property is attempted to be removed, or be attached or attempted to be assigned, then said note shall at once become due; and it shall and may be lawful for, and said Lewis thereby authorized and empowered the said Gregory & Co., executors, etc., with the aid and assistance of any person or persons, to take and carry away the mort-

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gaged property, and sell and dispose of the same at public auction upon giving one week's notice of the same in a newspaper of general circulation published in said county and State, and if there were no newspapers published in said county, then in any such newspaper published in said State, and out of the money arising therefrom to retain sufficient to pay the debt, etc. There is also a further provision in said mortgage, to the effect that Lewis, his executors, etc., might retain and continue in the quiet possession of said property, and in the full and free enjoyment of it, except as thereinbefore provided.

The mortgage and alleged foreclosure, before referred to, constitute the respondents' title to the property in suit. The difficulty in the case is to ascertain, *first*, what property was mortgaged; and *second*, was the same property sold upon the alleged foreclosure, or taken possession of by the respondents in any manner for such purpose. To solve these questions, we have only the mortgage and the said testimony to look to. I do not think it necessary that there should have been a regular foreclosure of the mortgage, in order to entitle the respondents to recover for a conversion of the lumber, if identified as that referred to in the mortgage. The taking possession of it by the respondents, and subsequent conversion by the appellant without any claim of title to it, would have been sufficient; but how could the jury have known that the lumber "under the mill in the basement," the lumber "under the dry-house," or in the "second story of the mill," or on the "first floor in the mill," or in the "yard above the mill," was the "lumber piled on the premises described as block 113, city of Portland?" Conceding that the respondents, by George C. Sears, sheriff, etc., took possession of the lumber referred to by the witness Crump, and that some of said lumber was on the yard on March 1, or March 12, 1883, still that does not prove that any part of it was part of the lumber included in the mortgage, or that the parties intended should be so included. I cannot understand how the respondents had any right to claim the lumber at the mill by virtue of the mortgage, without first proving that it was the lumber referred to in the mortgage, or some distinct portion

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or part of it. This question was raised in the outset of the trial. When the mortgage was offered in evidence by the respondents' counsel, the appellant's counsel objected to its introduction, upon the grounds, among others, that the description of the lumber in the mortgage was void for uncertainty. "Lumber piled on said premises" was evidently intended to mean lumber stacked, in the usual way, upon the mill premises. I do not think it was sufficiently certain to render the mortgage operative and effectual to bind any lumber, unless it were shown by extrinsic proof that Lewis, at the time the mortgage was executed, had lumber answering to such description. The description, standing alone, means nothing definite. It could, however, be rendered good by the aid of parol evidence, if the fact existed. (Jones on Chattel Mortgages, § 64.)

It seems to me that the court should have sustained the objection to the admission of the mortgage, unless the respondents' counsel offered, at the time it was made, to prove by evidence *aliunde* the lumber intended by the description. Without such proof, the mortgage was inoperative and void. (*Fish v. Hubbard's Adm'rs*, 21 Wend. 651.) No such offer seems to have been made; if it had been, the bill of exceptions ought to show it, in order to rebut the presumptions of error which the ruling, by itself, created. Had the proof identifying the lumber the parties intended the mortgage to cover been made at the time of its introduction, and the lumber referred to by Frank and Crump been shown to be the same lumber, or some distinct part of it, the action could have been maintained, no doubt. The other evidence in the case being what the court, in the absence of it, will presume it to have been, it was contended upon the argument that the court must presume that the respondents had possession of the lumber upon the premises, because it was so alleged in the complaint. The allegation in the complaint is that the respondents were the owners and in possession of a certain quantity of lumber. They undertook to prove it, by proving that they had a mortgage upon the lumber piled on the premises, known as block 113; that the proceedings before referred to were taken to foreclose the mortgage. This proof

simply throws us into a maze; what lumber was intended to be included in the mortgage, we have no means of ascertaining, and whether that in and about the mill was the same lumber cannot be shown. How can it be shown, when it is not known what lumber was intended by the description or reference to lumber in the mortgage? The admission of the truth of the allegation referred to would not, as I can see, aid the respondents. It would be an admission that they were in possession of some lumber, but it would not necessarily follow that it was the lumber in and about the mill.

Said counsel may have intended to claim, and perhaps did claim, that the evidence showed that the respondents were in possession of the lumber last referred to—the cedar, fir, ash, alder, maple, and black walnut—and that such possession was sufficient to enable them to maintain the action against the appellant for the conversion of it, as the latter set up no title to the lumber in its favor. Possession alone is sufficient, no doubt, to maintain such an action against a mere trespasser. But did the respondents have possession of the lumber last referred to? The controversy between the parties seems to have arisen, in regard to it, at the time the sale took place. Prior to that time, according to the testimony of Mr. Frank, the respondents had undertaken to foreclose the mortgage, by having the sheriff sell the property, or the part of it that was on the premises at the date of the execution of the mortgage, as provided in section 2, chapter 39, Miscellaneous Laws of Oregon. Mr. Frank testified that “so much of it as remained on the premises March 12, 1884, referring to the lumber mentioned in the mortgage, was sold by George C. Sears, sheriff, by authority of plaintiffs, and the same was purchased by plaintiffs.” He had before testified “that possession was taken by George C. Sears, at request of plaintiffs, prior to the said sale.”

It appears, however, that the lumber was where it had been deposited long before, at the time of the sale, and at the time the appellant is charged with having converted it; that evidently it had not been removed, or taken out of Lewis' possession. Sears, therefore, could only have taken formal possession of it,

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and as preliminary to, and for the purpose of selling it by virtue of the power conferred upon him by the statute, or possibly that contained in the mortgage. In either case, however, the respondents did not obtain such a possession of the lumber as would enable them to maintain the action; at most it was no more than a constructive possession, which would not be sufficient without establishing a further right, and which they could only establish under their pleadings, by identifying the lumber with that referred to in the mortgage. That, in my opinion, they did not do. A possession of personal property, in order to be sufficient to enable a party to maintain an action for its conversion, should be absolute and complete. I do not think that the respondents had any such possession in this case.

The counsel for the respondents contended at the hearing, and claim in their brief, that the notice of appeal herein does not specify the grounds of error upon which the appellant intended to rely on the appeal with sufficient certainty. The specification is very general and loose, and probably would not stand the test of a number of the decisions of this court heretofore made upon that question. The court latterly, however, has been inclined to pursue a more liberal course in such matters. It has been more disposed to retain an appeal, and consider the merits of it, where the error or defect does not affect the substantial rights of the adverse party. The spirit of the Code is opposed to the application of stringent rules in the matter of form. It favors more the course and policy of considering and adjudicating upon the matters of substance, and of disregarding mere technicalities.

A notice of appeal must specify the grounds of error relied on with reasonable certainty. The statute requires that it do so, but at the same time, it requires "that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." If the respondents had been misled, in consequence of the loose and general mode adopted in pointing out the errors alleged, the court would feel compelled to refuse to hear the appeal; but they have not been prejudiced evidently in

this case in consequence of any such practice. They were represented here by an able counsel, who was well prepared, and has ably discussed every question presented in the record. And if the court should fail to consider a material point involved in the matter, or adopt some view inconsistent with the facts connected therewith, its attention can be called to it by a petition for a rehearing, which secures a further consideration of the subject. It is obvious that the contention of the parties was in regard to lumber Lewis had on hand when the attempt was made to foreclose the mortgage. The burden of proving that it was included in that instrument devolved upon the respondents, and should have been made when they sought to establish their rights to it by virtue thereof. The mortgage upon its face secured to them no right to any lumber, without proof identifying the lumber intended, and was confined to lumber "piled" on the premises referred to. I think it was error to allow the mortgage to be introduced in evidence, when objected to, upon the grounds mentioned, without requiring such proof to be made. In no other way could the mortgage be rendered effectual for any purpose, and its competency depended upon the production of such proof to accompany it, and locate and apply the description contained therein.

In *Fisk v. Hubbard's Adm'rs*, *supra*, Judge Cowen used the following language: "The learned judge at the circuit thought the description of the property in the covenant so entirely uncertain that the instrument was inoperative and void. *And it is clearly so, if we are bound to stop with reading it, and cannot go beyond the contract in search of its meaning.*" To "go beyond the contract in search of its meaning" is to ascertain the subject-matter to which it refers through the means of extrinsic evidence, which, in connection with the instrument, establishes the right. The extrinsic evidence is essential to the completion of the meaning of the instrument, and the latter can be admitted in proof only on condition that the former is introduced. If the Circuit Court had allowed the introduction of the mortgage upon condition of the introduction of the character of evidence referred to, we might have presumed that it had been introduced; but the ruling

Points decided.

was absolute. The effect of it was that the mortgage was competent proof in itself, and required no extraneous evidence to ascertain the lumber to which the description applied. The ruling could not have failed to mislead the jury. Under this view the judgment appealed from should be reversed, and the case remanded for a new trial.

[Filed November 28, 1887.]

**JAMES HAMLIN, APPELLANT, v. FRANK KASSAFER
ET AL., RESPONDENTS.**

OFFICER DE FACTO—ACTS OF.—An office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. From its inherent nature, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time.

POSSESSION OF OFFICE—WHAT CONSTITUTES.—To constitute a person an officer *de facto* he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties, and when this is the fact, necessarily, there can be no other incumbent of the office. An officer *de facto* is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office.

CLAIM OF RIGHT—COLOR OF.—The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or without such color a performance of official duties, with the acquiescence of the public for such a length of time as to raise a presumption of colorable right.

THE PUBLIC INTEREST.—The interest of all persons having business with the office in controversy, imperatively demand that until the question of title can be decided, there should be some person recognized as in peaceable possession *de facto* of the office, and of the muniments necessary to discharge its duties.

TERM OF OFFICER—EXPIRATION OF—ACTS OF.—Where one is holding over after the expiration of his term under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed.

JUDGMENT OF DE FACTO JUDICIAL OFFICER—COLLATERAL ATTACK UPON.—When F. was holding the office of justice of the peace, and in a subsequent election was defeated by H., who received the certificate of election, duly qualified, and demanded possession of the office, which F. refused to surrender, *held*, that F. was a *de facto* officer, and that a judgment obtained before him could not be collaterally assailed.

APPEAL from Jackson County. **Affirmed.**

W. R. Andrews, for Appellant.

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H. K. Hanna, for Respondents.

LORD, C. J. — This action was brought by the plaintiff against the defendants to recover certain personal property alleged to have been wrongfully taken. The defendants admitted the taking, but justified in substance to this effect: That on the 28th day of September, 1887, the defendant Carlton recovered a judgment in a Justice's Court before one E. D. Foudroy, against the plaintiff Hamlin, for the sum of eighty dollars and costs; that execution was issued thereon, and placed in the hands of the defendant Kassafer as constable, and that the property aforesaid was seized and taken into custody under the same, etc. The plaintiff denied the recovery of the judgment in the said Justice's Court, or in any court, etc. Upon issue being thus joined, the issue raised was as to the validity of said judgment.

The evidence as disclosed by the bill of exceptions is, in substance, that one E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville, at the general election in 1884, and had entered upon the discharge of the duties of his office; that at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbel, who received the certificate of election and duly qualified, and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office in which he had held court as a justice of the peace, and of the docket and books, and also a sign at the door notifying the public he was such officer; that the defendant Hubbel, when said judgment was rendered, was in possession of the town hall, and had acted as, and performed the duties and functions of a justice of the peace, and that these matters were open and notorious; but the evidence indicates that these acts were performed in his official character as a city recorder, by virtue of which he was *ex officio* justice of the peace; that the defendant Carlton at the time of

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the recovery of said judgment was a resident of Medford, and had no knowledge of any dispute as to who was justice of the peace. Upon this state of facts the court gave several instructions which were excepted to, and refused to give another, which constitutes the main source of grievance, and from which it is evident that the plaintiff sought to have the court instruct the jury that the defendant Foudroy was a mere usurper when the judgment was rendered by him.

It is admitted, therefore, that this record presents only one question, was Foudroy a *de facto* officer? Upon this point there would seem to be little room for controversy, for conceding, as was argued, that Hubbel, by reason of official duties performed at the town hall, was reputed to be a justice of the peace, it by no means follows that these facts operated to displace Foudroy, and induct *him* into the possession of the disputed office. To render the judgment void, Foudroy must have presumed to act without any just pretense or color of title. As this is the contention of counsel for the plaintiff, it may not be amiss to note, preliminarily, some distinctions as to officers, which will render the law applicable to the facts in hand more evident.

An office has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it, and Chief Justice Marshall says: "He who performs the duties of that office is an officer." From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time. It becomes important, then, to observe the distinction between an officer *de jure* and an officer *de facto*. Lord Ellensborough said: "One who has the reputation of being the officer he assumed to be, and yet is not a good officer in point of law, is an officer *de facto*." (*King v. Bedford Level*, 6 East, 356.) To constitute a person an officer *de facto*, he must be in the actual possession of the office, and in the exercise of its functions and in the discharge of its duties. When this is the fact necessarily, there can be no other incumbent of the office. An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from, or never actually taken posses-

sion of the office. When the officer *de jure* is also the officer *de facto*, the lawful title and possession is united; then no other person can be an officer *de facto* for that office. "Two persons cannot be officers *de facto* for the same office at the same time." (*McCahon v. Commrs.* 3 Kan. 442; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80.) "An officer *de facto*," said Storrs, J., "is one who exercises the duties of an office, under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other hand, from an officer *de jure*, who is, in all respects, legally appointed and qualified to exercise the office. It is not in all cases easy to determine what ought to be considered as constituting a colorable right to an office, so as to determine whether one is a mere usurper." (*Plymouth v. Painter*, 17 Conn. 588.) The distinction, then, which the law recognizes, is that an officer *de jure* is one who has the lawful right or title, without the possession of the office, while an officer *de facto* has the possession and performs the duties under the color of right, without being actually qualified in law so to act, both being distinguished from the mere usurper, who has neither lawful title nor color of right. The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right. (*Brown v. Lunt*, 37 Me. 428; *Burk v. Elliott*, 4 Ired. 355; *Conover v. Devlin*, 15 How. Pr. 477; *Ex parte Strang*, 21 Ohio St. 610.) Said Sutherland, J.: "There must be some color of election or appointment, or an exercise of the office, and an acquiescence for a length of time, which would afford a strong presumption of, at least, a colorable election or appointment." (*Wilcox v. Smith*, 5 Wend. 233. See, also, *State v. Carroll*, 38 Conn. 449.) It may be said, then, that the color of right which constitutes one an officer *de facto*, may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for

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such a length of time as to raise the presumption of colorable right by election or appointment.

From considerations of public policy, the law recognizes the official acts of such officers as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and as to third persons who have an interest in the thing done. (*People v. Stevens*, 5 Hill, 630; *Burton v. Patten*, 2 Jones [N. C.] 124; *People v. Sassovich*, 29 Cal. 480.) Within the scope of his authority, the acts of an officer *de jure* are valid for all purposes. Not so with an officer *de facto*; his acts are only recognized in the law to be valid and effectual so far as they affect the public and third persons. As to these, his acts are as valid as if he were an officer *de jure*. The reason of the rule is apparent. It would be as unjust as unreasonable to require every individual doing business with such officer to investigate and determine at his peril the title of such officer. "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called into question." (*Devens, J.*, in *Petersilea v. Stone*, 119 Mass. 467.) Besides, it is against the policy of the law to allow a suit between private individuals to determine the title to an office. Such judgment could only bind the parties, and would be of no effect as against the public.

Upon the facts of the case in hand, Foudroy was not an intruder, and did not usurp the office. He may have been holding over without legal authority. His term had expired, but he had not been ousted, but remained in the possession of the office, and continued to exercise the functions and discharge its duties. A mere usurper is one who acts without color of title, and whose acts are utterly void. (*Hooper v. Goodwin*, 48 Me. 80; *Tucker v. Aiken*, 7 N. H. 113.) Said Christian, J.: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts

the incumbent without any color of title whatever; and his acts are void in every respect." (*McCrow v. Williams*, 33 Gratt. 513.) Certainly, upon no view of the facts can Foudroy be regarded as an intruder or usurper within the purview of the law. From the fact that there was evidence tending to show that at the town hall Hubbel had discharged duties belonging to the office of a justice of the peace, and was reputed by some persons to be such officer, the counsel for the plaintiff assumes as a consequence that Foudroy had been dislodged or ousted, and that these facts, without, in fact, being in possession of the office, its books, or docket, operated in some way, I suppose, to give him constructive possession, and to constitute him an officer, not only *de jure* but *de facto*, and to make the acts of Foudroy those of an intruder or usurper.

Laying aside the fact that the witness who testified as to such acts of Hubbel in the town hall, also stated on cross-examination that Hubbel was at the time city recorder, by virtue of which he was *ex officio* justice of the peace, and that he did not know whether such acts were performed as an *ex officio* justice of the peace or not, it is plain law that no such consequences resulted. Foudroy being in possession of the office with the legal *indicia* of title, he was a *de facto* officer, and until the question of title was settled by a proper proceeding, he may discharge the duties of the office. "Until then," that is, ousted by *quo warranto*, says Mr. Blackwell, "he holds the office by the sufferance of the State, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them." (Blackwell on Tax Titles, 117.)

In *Leach v. Cassidy*, 23 Ind. 449, the court say: "The law has provided abundant means by which an officer *de jure* may become such *de facto* against another who wrongfully holds possession; but the public are interested; while such litigation is pending to settle the right, the function of the office shall continue to be exercised, in order that public business may be done. To this end, it is a rule of plain common sense, as well as law,

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that an officer *de facto* shall act until he be ousted." Again, in the same court, in *State v. Jones*, 19 Ind. 358, Perkins, J., said: "But if when such person attempts to take possession of the office he is resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by law. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he may do so," etc. To the same effect in *Conover v. Devlin*, 5 Abb. Pr. 176, it is said: "The public interest—the interest of all persons having business with the office in controversy—imperatively requires that, until the question of title can be decided, there should be some one person recognized as in peaceable possession *de facto* of the office, and of course of the muniments necessary to discharge its duties.

In *State v. Durkee*, 12 Kan. 314, the court say: "The interest of the public requires that somebody should exercise the duties and functions of the various offices pending a litigation concerning them, and no one has a better right to do so than the various officers *de facto* who claimed to be officers *de jure*." "It would be strange doctrine," said Valentine, J., "to announce that whenever an officer steps out of the place where he usually does his business that any person who chooses to claim the office may at once step in, and become immediately an officer *de facto*. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office. The only legal remedy in such case for the party out of the office to obtain the possession of the same is by a civil action in the nature of a *quo warranto*." (*Brady v. Theritt*, 17 Kan. 471.) The evidence is that Hubbel, who was elected and qualified, demanded the office, but that Foudroy, who was in possession, refused to deliver it up, or the books, papers, and docket, but remained in the possession of the same, exercising its functions and discharging its duties, when the judgment claimed to be void was rendered.

How, then, could Hubbel be in possession of such office? If he could not acquire possession and make himself an officer *de facto* by slipping in when Foudroy was out of the place where

he kept his office, according to the authority last cited, how could the acts supposed to have been performed as a justice of the peace in the town hall operate to give such possession, or constitute him an officer *de facto*? However much he may have been entitled to obtain the office, nothing but actual incumbency could make him the justice of the peace of the precinct to which he was elected. Note the analogy of the facts in *Morton v. Lee*, 26 Kan. 287, to the case in hand. For brevity they are taken from the syllabus: "Where a person is duly appointed by the governor of the State as a justice of the peace, and thereafter qualifies and enters upon the discharge of the duties of the office, and is placed in full possession of the books, papers, and docket pertaining to the office, and after the expiration of his term under his appointment continues to hold over, and refuses upon demand of his successor in office to deliver up the books, papers, and docket of the office, and has full charge and control of the same, and continues to discharge the duties of the office, and is generally recognized by a large portion of the people where he holds his office as such officer, *held*, that he is a justice of the peace *de facto*, and his acts as justice of the peace, though not those of a lawful officer, are valid so far as they involve the interest of the public and third persons."

In *Carli v. Rhener*, 27 Minn. 293, Smith, who had been elected judge, qualified, and thus under a statute became *de jure* a judge in the place of his predecessor N., whose term then expired. Thereafter upon the same day, before S. began to perform the duties of the office, N. directed judgment in an action he had tried; *held*, that his acts in doing so were those of an officer *de facto* and were valid.

From these citations it must be manifest that where one is holding over after the expiration of his term under claim or color of right, that his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed. And it must be considered as equally well settled that while he is in possession of such office, when an adverse claim is made, he may continue to exercise the office until the question is settled. As Foudroy was never ousted, or

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in any manner abandoned the office, but continued in possession thereof, with all its legal *indicia*, exercising its functions and discharging its duties, he was a *de facto* officer, and as such when the judgment was rendered, it cannot be collaterally assailed.

The judgment of the court below must therefore be affirmed.

[Filed December 6, 1887.]

ELLEN DAY, RESPONDENT, v. MARGARET HOLLAND ET AL., APPELLANTS.

DECREE—APPEAL—EFFECT THEREOF.—An appeal from a decree does not break it up. Until annulled or reversed, it is binding upon the parties as to every question directly decided.

SECTION 514 OF HILL'S CODE.—The effect of this section upon an action while an appeal is pending, considered but not decided.

TORT—MALICE—MEASURE OF DAMAGES.—The usual and ordinary measure of damages in an action for a tort is that sum which will fully compensate the plaintiff for the actual injury he has sustained; but when the wrong is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, or that the act was done wantonly, maliciously, or wickedly, the jury may, in their discretion, give exemplary damages.

EVIDENCE TO REBUT MALICE.—Where the injury complained of is alleged to have been done maliciously, or under circumstances which would authorize the jury to give more than the actual damages, it is competent for the defendant to prove any facts which tend to show he did not act maliciously or with a bad motive.

APPEAL from Multnomah County. Reversed.

H. T. Bingham, and *Cornelius Taylor*, for Respondent.

F. V. Holman, and *A. L. Frazier*, for Appellants.

STRAHAN, J.—This is an action to recover damages for a malicious trespass on real property, alleged to have been committed in said county of Multnomah on the sixth day of October, 1886. The actual damage alleged was sixty dollars, but by reason of the alleged malice of the defendants, and the aggravated circumstances of the trespass, the plaintiff claimed damages in the sum of one thousand dollars. Upon a trial before a jury she was awarded the sum of six hundred dollars. From that judgment this appeal is taken. The cause was tried on the twenty-sixth day of February, 1887.

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For the purpose of justifying their entry upon the premises in question, the defendants offered in evidence upon the trial a properly certified copy of the judgment roll, in a suit theretofore finally determined in Department No. 2 of the Circuit Court of Multnomah County, wherein Margaret Holland was plaintiff, and Ellen Day, James Day, Lizzie Day, Mary Day, and Frank Day were defendants. The final decree in said last-named suit was entered on the twenty-seventh day of September, 1886, the object of which was to quiet the title of the plaintiff to the real property upon which the alleged trespass was committed. The court by its decree found for the plaintiff as to the particular parcel of land where the injury complained of in this case was committed, and decreed that "the said defendants, and each of them, and all persons claiming through, by, or under them, be, and they are hereby forever barred of any and all right, title, estate, or interest in or to the said real estate, or any portion thereof, and are hereby restrained and enjoined forever from claiming or asserting or exercising, or attempting to exercise any right, title, or interest therein, or thereto, or in any manner interfering with the title or possession of said plaintiff in and to the said property; and that the legal title and the right to the immediate and continued peaceable possession in and to the said property is hereby confirmed, ordered, and decreed," etc. It further appeared from the said judgment roll that an appeal had been taken from said decree by the defendants to this court, and that on such appeal the undertaking was given for an appeal only. It did not appear from said judgment roll that said cause had been remanded from this court to the court below. The judgment roll was excluded, to which ruling an exception was taken, and this is the only material question presented by this appeal.

It is claimed by the appellant that this decree was competent evidence for either one of two purposes: (1) That it constituted a full and complete justification for all of the alleged trespasses charged in the complaint; or (2) that it was competent evidence to be submitted to the jury tending to negative and disprove malice. The jurisdiction of this court is appellate and revisory only. It can exercise no original jurisdiction. Article vii.,

section 6, of the Constitution vests and limits its jurisdiction in these words: "The Supreme Court shall have jurisdiction *only* to revise the final decisions of the Circuit Courts. . . ." This *revisory* jurisdiction is exercised by means of a statutory appeal.

The same statute regulates the method of appeals in both actions at law and suits in equity. The only distinctions which it makes in the two classes of cases is, that if the appeal be from a decree, the appellant need not specify in the notice of appeal the grounds of error upon which he intends to rely, and if the evidence has been taken in writing, the cause shall be tried anew upon the transcript and evidence accompanying it. If the evidence has not been taken in writing in the court below, an equity case is re-examined here only upon the exceptions which were taken in the court below. The first question, therefore, is, what effect did the appeal have upon the decree in said cause? Was the decree in question vacated and broken up by the appeal so that it ceased to be binding upon the parties, or was its enforcement stayed pending the appeal by force of section 539 of Hill's Code, and what was the effect of such "stay," if it existed? In such a case as this, the statute has not declared the effect of an appeal during its pendency upon the decree; we are therefore compelled to examine the question on reason and authority outside of the State.

In *Dutcher v. Culver*, 23 Minn. 415, it was held that where the statute provides that a party may appeal, no certain inference can be drawn from the term "appeal" alone as to its effect upon the proceedings below; and that in determining what effect was, the court might properly look at the general policy of the law of appeals as furnishing a valuable analogy, and to the practical consequences of giving to the appeal the effect to stay proceedings below, or the contrary effect. Apply this view to the case, the court was of the opinion that the appeal from the order of the probate court did not vacate or suspend the operation of the order. The case of *Sixth Avenue R. R. Co. v. The Gilbert Elevated R. R. Co.* 71 N. Y. 430, involved, as I think, the precise question presented by this record. In that case, as here, the final decree enjoined the defendants from doing

certain things. The parties enjoined appealed, and gave the undertaking to stay the judgment, and then claimed that their appeal during its pendency relieved them from the effects of the injunction. But the court held otherwise. The court said: "If the respondent here is right in its contention, pending an appeal from a judgment staying waste, which if committed will destroy the freehold, the appellant in simply staying the plaintiff's proceedings on the judgment may with impunity do the very act forbidden, and destroy the freehold. This would be to give the latter injunction, staying action by the one party upon the judgment, effect, as working a dissolution of the permanent and general injunction before granted, restraining the other party from doing any act affecting the subject of the litigation. The judgment, so far as it enjoined the defendant, needed no execution. It acted directly without process upon the defendant, and the stay only operated to prevent the collection of the costs awarded."

So in *Nill v. Camparet*, 16 Ind. 107, it was held that the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, until annulled or reversed, the judgment is binding upon the parties as to every question directly decided. So in *Cain v. Williams*, 16 Nev. 426, it was decided that the pendency of an appeal, when the appellate court has no other duty than to affirm, reverse, or modify the judgment appealed from, does not suspend the operation of the judgment; the judgment is good until set aside. So, also, in *Swing v. Townsend*, 21 Ohio St. 1, it was held that the appointment of a receiver, while the cause is in the common pleas, is not vacated or suspended by an appeal to the District Court, and the powers and duties of the receiver will continue, notwithstanding the appeal. These cases also are to the same effect: *Lewis v. St. Louis etc. R. R. Co.* 59 Mo. 495; *Orleans v. Platt*, 99 U. S. 676; *Burton v. Burton*, 28 Ind. 342; *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45; *Farmers' L. & T. Co. v. Cent. R. R. Co.* 4 McCrary, 546; *Allen v. Mayor and Aldermen of Savannah*, 9 Ga. 286; *Chase v. Jefferson*, 1 Houst. 257; *Suydam v. Hoyt's Adm'r*, 1 Dutch. 130; 2 Dan-

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iel's Chancery Practice, § 1467, and note 3; *Paine v. Schenectady Ins. Co.* 11 R. I. 411. And this rule seems to be sustained by the weight of authority, and is elementary. (Freeman on Judgments, § 328; Woods' Pr. Ev. p. 735.)

In reaching the conclusion indicated by these authorities, we have not overlooked the distinctions which existed prior to the enactment of the Code between the effect to be given to an appeal and the suing out of a writ of error. But such distinctions are swept away by the Code. The entire procedure is now governed by one statute, and no sufficient reason appears to us for making the distinction claimed by the respondent. This very case is a good illustration why such distinction should not be tolerated or recognized. In the original case of *Holland v. Day*, as has been shown, a final decree was entered in favor of the plaintiff, adjudging her to be the owner of the premises then in dispute, and perpetually enjoining the defendant from claiming the same, or in any manner interfering with the plaintiff's peaceable enjoyment of the same, from which decree the defendant appealed. After the entry of that decree the plaintiff, present defendant, undertook to enter under it, and was resisted, and for that alleged wrong this action is brought, in which the plaintiff is awarded six hundred dollars damages. Upon the appeal in said suit, this court affirmed the decree of the court below, so far as the particular premises in controversy in this action are concerned, so that it is apparent that this defendant is mulct in six hundred dollars damages and costs for an attempted entry on her own premises under a valid and unreversed decree of the Circuit Court of Multnomah County. A construction which may produce such results is unsound, and cannot receive the sanction of this court.

Our attention has been called to the latter part of section 514 of Hill's Code, which provides: "An action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." But this section has no direct bearing upon the question involved here. To adopt the respondent's construction of this section would be to hold, in effect, that

a judgment or decree is ineffectual and without any force until the time allowed to take an appeal has expired, for the reason that during that time the action is to be deemed pending. The facts of this case do not require a construction of this language, further than to say that the one suggested on argument cannot be adopted. Judgments and decrees are constantly enforced and executed long before the time for an appeal has expired, and the right to do so has never been before questioned in this court. But if a construction of that language were really necessary to a proper determination of this case, we should feel disposed to hold that it is in effect declaratory of the rule of law, as it existed before the enactment of the Code. In other words, that after judgment a party may take such steps in the action as are sanctioned or provided by law, and that for these purposes and these only the action is "to be deemed pending," and not that the whole action, for all purposes, and before the judgment is vacated or set aside, is still *sub judice*. To give this language the construction contended for, would be to hold that until the time for appealing had expired, a judgment is without legal force or effect, and that during that time neither party is bound by it.

It is claimed by respondent's counsel that under section 539 of Hill's Code, this decree was stayed by the appeal without the usual undertaking. But this does not affect the result. The "stay" in either case would only prevent the enforcement of the decree so far as it required the enforcement of the payment of money. The other part of the decree needed no enforcement. It operated upon the status of the thing, and fixed it irrevocably, unless changed on appeal.

In this class of cases, the usual and ordinary measure of damages is the amount which will fully compensate the plaintiff for the actual injury which he has sustained; but where a tort is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, and generally when the defendant appears to have done the act wantonly, maliciously, or wickedly, the jury may, in their discretion, give exemplary damages. But to enable them to act intelligently and justly in such case, it is

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important that every fact and circumstance bearing upon the motives of the defendant, or affecting his conduct at the time, and all the circumstances under which he acted, should be fully laid before them. The defendant, therefore, had the right to place before the jury in this case the decree offered in evidence as explanatory of his motives, and as tending to rebut the charge of malice. It tended to prove a reason for the defendant's conduct other than that charged in the complaint, and for this purpose it was wholly immaterial whether the decree was in full force or not, if the defendant honestly believed that it was, and that she had a right of entry under it.

These considerations lead to a reversal of the judgment; but inasmuch as the decree offered in evidence furnished a complete justification for the entry complained of, we think it unnecessary to order a new trial.

LORD, C. J., dissenting.—At common law, a writ of error was the appropriate remedy, by which a party aggrieved by the judgment of an inferior jurisdiction could remove the judgment for examination into a superior tribunal, having jurisdiction to revise it. It lies for some supposed mistake in the proceeding of a court of record, and only upon matters of law arising upon the face of the proceedings. (3 Blackst. Com. 406.) It was defined as "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination, to affirm or reverse the same according to law." (*Cohens v. Virginia*, 6 Wheat. 409; *Jaques v. Cesar*, 2 Saund. 101, notes 1, 2; *Tidd's Practice*, 1134.) The writ was grantable, in civil cases, *ex debito justicie*, in criminal cases, *ex gratia regis*.

The distinction between an appeal and a writ of error is that an appeal is a process of civil-law origin, and removes the cause entirely, subjecting the fact as well as the law to a review and revisal; but a writ of error is of common-law origin, and it removes nothing for re-examination but the law. (*Wiscart v. D'Auchy*, 3 Dall. 321; *United States v. Goodwin*, 7 Cranch, 111.) It is said to have been taken from the civil law and introduced

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into the procedure of courts of equity and admiralty; and thence again from these, it has been adopted into the codes of reform procedure. In a technical sense, the main features which distinguish it from a writ of error are, that the party aggrieved by the decree applies to the Supreme Court to rehear his cause; and when the appeal is allowed or perfected by citing the other party to appear, and having the record of the proceedings transmitted to the appellate court, it is heard anew, and tried and decided as if it had not been adjudicated. As a consequence, it is the original theory that an appeal, when perfected, annuls the decree below. "A writ of error is an adversary suit; it is a new suit, and must have the requisite parties" (*Hutchinson v. Hutchinson*, 15 Ohio, 301); but the judgment which is brought to annul and set it aside is not vacated or affected pending the proceeding. Said Mr. Justice Deady: "A writ of error was considered a new action to annul and set aside the judgment of the court below; and if the writ was seasonably sued out, and bail put into the action, it was a *supersedeas*, so far as to prevent an execution from issuing on the judgment, pending the writ of error; but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel." (2 Bacon's Abr. 87; 3 Blackst. Com. 406; *Kansas Pac. R. R. Co. v. Twombly*, 100 U. S. 81.) But in equity and the admiralty courts, the remedy for an erroneous decree is an appeal; which removes the whole case into the court above for trial *de novo*. There is no decree left in the lower court, and pending the hearing on appeal, there is no decree in the case, and there can be no estoppel by reason thereof.

The tendency during the last half century has been to assimilate proceedings in equity and law cases; and in States where the modern Code prevails, the proceeding by which judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal. (*Sharon v. Hill*, 26 Fed. Rep. 345.) Now to which extent has these two modes of review, as thus distinguished, been modified by statute regulation in our Code? In the practice codes of many of the States, the old forms of action have not only been

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abolished, but they have abolished the distinction between actions at law and suits in equity.

In this State the distinction between the forms of action at law has been abolished; but proceedings in equity are still kept distinct from an action at law. (*Burrage v. B. G. & Q. M. Co.* 12 Or. 172.) "Our Code," said THAYER, J., "presumes the forms of action and suits as distinct from each other" (*Beacannon v. Liebe*, 11 Or. 443); and also in the result reached after trial, the distinction of judgment or decree is still preserved. For the review of a judgment or decree, the Code has made ample provision, and the proceeding is known as an appeal. (Hill's Code, §§ 525-537, inclusive.)

In actions at law upon appeal, it is necessary to specify the grounds of error relied upon, but not so when from a decree in equity. When the appeal is from a judgment in an action at law, the judgment can only be reviewed as to questions of law appearing on the transcript, and is only to be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from a decree, the suit is required to be tried anew upon the transcript and evidence. And in either case, whether of a judgment or decree, if a stay of proceedings is denied during the pendency of the appeal, an undertaking or bond is required to be given to effect that result. The object of the stay is to prevent the execution of the judgment or decree pending the appeal, and when this is affected by a proper bond, it operates to suspend the right to execution; but in the absence of a statute regulation, leaves the judgment, until annulled or reversed, subject to the common-law rule, binding and conclusive on the parties as to every question directly decided, and the decree inoperative for any purpose whatever during that time.

The provisions of the Code which we are now considering do not undertake to declare or prescribe what effect shall be given to a judgment or decree pending the appeal. In all this, however, it will be noted that the appeal from a judgment at law under our Code of practice corresponds more nearly with the writ of error, and in effect is more like it than appeal; while an appeal from a decree in equity, in bringing up the whole record

and evidence to be tried *de novo*, substantially conforms to the original theory of an appeal as introduced from the civil law into the equity and admiralty practice, and leaves no decree in the case to operate as a bar or estoppel, unless the provisions for a stay by some legerdemain has the effect to retain the decree in full force, and placed it upon the same footing as to its conclusive character until reversed as a judgment at law. In that event, a judgment or decree, pending the appeal, would be *res adjudicata* as to every matter directly decided until annulled or reversed. This is the result reached by my associates, and I confess it has always been my impression from a cursory view of the provisions of our Code in reference to appeals, that when a judgment or decree is rendered in the Circuit Court, and an appeal is taken from it, and a stay bond given, such judgment or decree is binding and conclusive upon the parties and their privies in every other court until such judgment or decree is annulled or reversed. Hence, I have supposed a decree like a judgment, pending appeal, is allowable as evidence between the parties in any case when pertinent and proper.

The present discussion, however, has called our attention to a provision of the Code which has hitherto been overlooked by me. I refer to section 505, which provides that "an action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." What does this mean, if not to say that, while an action or suit is pending, no judgment or decree rendered therein is conclusive on the rights of the parties until finally determined on appeal, or until the time for appeal has passed? If the action or suit is to be deemed pending until finally determined on appeal, it is still under judicial consideration during such pendency, and not judicially determined. It is impossible that an action or suit should be pending, that is, under judicial consideration, and at the same time be *res adjudicata*, or a final determination, which is conclusive on the right of the parties. It is a contradiction of terms to say that a matter in litigation is pending, undecided, and at the same time is decided and *res adjudicata*. With the exception of Cali-

fornia, no other State, so far as my inquiries have extended, has a like provision.

In that State, section 1049 is identical with our own, and has been construed by an eminent judge of that State to mean that a case upon an appeal is still pending—still *sub judice*—until finally decided, and cannot, therefore, during such pendency, be regarded as *res adjudicata*, or having any effect as evidence. In *Sharon v. Hill*, 26 Fed. Rep. 722, Mr. Justice Sawyer, referring to section 1049 as expressly providing that “an action is deemed pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed,” says: “By the express terms of this section, therefore, a judgment is not final as to the subject-matter—is not a final or conclusive determination of the rights of the parties—not only until the final determination on appeal,” but where no appeal has been taken, “until the time for appeal has passed. Until the time indicated, the action is deemed to be pending; that is to say, remains inconclusive, not finally determined, and liable to be changed or altogether vacated and annulled. The action is therefore still pending, and the subject-matter remains *sub judice*.” And again: “By the express terms of the statute the action is still pending and undetermined. The litigation of the matter is not ended. It is still flagrant. The subject-matter is still *sub judice*, and a matter still *sub judice* cannot possibly be *res adjudicata* in any proper sense of that phrase. To say that a matter *sub judice* is at the same time *res adjudicata* would be a contradiction of terms. The two conditions with reference to the same subject-matter cannot possibly be found to exist.” After showing that the effect of an appeal upon a judgment as *res adjudicata* had been previously settled by the decisions of the Supreme Court, independently of the provisions of the Code referred to, he then adds: “But there can be no possible doubt, it seems to us, under the provisions of the present Code cited, that a case upon appeal is still pending—still *sub judice*—until finally decided, and that it cannot be regarded as *res adjudicata*, or as having any effect as evidence. The effect or value of a judgment is therefore *fixed by the Code* and the decisions of the

Supreme Court. This being so, it will be unprofitable to examine the few cases cited from other States, arising under a different practice, and presenting different conditions, to support the opposing view." In the same case Mr. Justice Deady reached a like conclusion. Referring to and quoting section 1049, he tersely said: "The effect of this provision appears to be, that the judgment in the court below is only a step in the proceeding to a final judgment in the appellate court, in case of an appeal, and otherwise to hold it in suspense as a ground of action or defense in another suit until the time for taking an appeal has passed."

As section 505 applies both to actions and suits, if this be its proper construction—its meaning and purpose—it affects judgments and decrees alike, and not only stays their execution pending an appeal, but suspends their operation for all purposes, so that neither is admissible in evidence in any controversy between the parties. It reverses the common-law principle as to the conclusive effect to be given to a judgment, until annulled or set aside by the appellate court. In legal parlance, the word "pending" means nothing more than "remaining undecided" (*Cleander v. Allen*, 4 N. H. 385; 48 N. H. 210); and if the subject-matter in litigation between the parties is pending during an appeal, it is undecided, not finally determined, but *sub judice*, and not *res adjudicata*, and therefore cannot have any effect as evidence, or operate as a bar or estoppel.

In the absence of this provision, our statute substantially preserves the distinction as it existed at common law as to writs of error and trials *de novo* in equity upon appeal, and it occurs to me there are many reasons why the distinction should still be preserved, and would be the better rule of practice. But our duty is not to make the law, but to expound and declare it; and in the light of the construction given to section 505, and that seems to me to be its plain purport and meaning, I am constrained to think that the court committed an error in excluding the decree as evidence, *res adjudicata*, as to the rights of the parties. In the course of the argument something was said as to a late act of the legislature authorizing parties in suits of equity, if they so preferred and consented, to try the case as an action at

law, without reducing the evidence to writing, and to bring it up on a bill of exceptions, etc., and that in such case it would be treated on appeal as an action at law. That probably may be so, but it is not material to the question here, for our statute makes no distinction pending an appeal in respect to actions or suits, and consequently neither a judgment nor decree would be conclusive on the parties as evidence, until finally determined on appeal, or the time of appeal has passed.

[Filed December 7, 1887.]

JOHN F. KELLEY, APPELLANT, v. JONATHAN
BOURNE, JR., ET AL., RESPONDENTS.

DEED—GRANTEE.—In every deed or grant there must be a grantee named, or be ascertained by description, so as to distinguish him from all others.

PARTNERSHIP CONSIDERED AND DEFINED.—A partnership is a combination by two or more persons of capital, labor, or skill for the purpose of business, for their common benefit.

CASE IN JUDGMENT—PARTNERS INTER SE.—The parties signing the agreement creating the "Grant's Pass Real Estate Association" became partners *inter se*, for all the purposes stated in the writing.

PARTNERSHIP NAME.—Every partnership should have its proper name or style. It may be whatever name the partnership chooses; and this name need not be prescribed in the articles, or determined upon by express agreement.

DEED IN PARTNERSHIP NAME.—A deed to a partnership by its firm name is not void.

APPEAL from Josephine County. Reversed.

Tanner & Carey, for Appellant.

S. U. Mitchell, and *Joseph Simon*, for Respondents.

STRAHAN, J.—This suit is prosecuted to quiet the plaintiff's title to certain real property situated in the town of Grant's Pass, in Josephine County, Oregon. The complaint states the necessary facts to bring the case within section 504 of Hill's Code. The answer denies the allegations of the complaint, and then alleges, in substance, that long prior to the time of executing the plaintiff's deed, viz., in July, 1885, plaintiff's grantors,

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H. B. Miller, C. K. Chancellor, Joseph Moss, Solomon Abraham, and T. P. Judson, entered into a certain agreement in writing, by which said parties formed themselves into an association or company for the purpose of buying, owning, holding, leasing, selling, mortgaging, and conveying real property, lands, and tenements in and adjoining the town of Grant's Pass, Josephine County, Oregon; and for the purpose and with the power to carry out the purposes of said association or company, and the agreements of each of the members thereof, all of which were duly and fully set forth in said agreement in writing, and were well known by plaintiff when he acquired his deed as alleged in his complaint. That at the time said plaintiff received his deed from the aforesaid grantors, neither of said grantors had any title to said land, except an undivided equitable interest therein; but said grantors, and each of them, had long prior thereto, viz., the fourteenth day of July, 1885, divested themselves of title to said land by duly executed deeds of conveyance thereof to the said Grant's Pass Real Estate Association, duly witnessed, acknowledged, and recorded, all of which plaintiff well knew at the time he received his alleged deed from said pretended grantors.

The said grantors, H. B. Miller, C. K. Chancellor, and Joseph Moss, were members, stockholders, and copartners with Solomon Abraham and T. P. Judson in said association, and that Solomon Abraham and T. P. Judson entered into the organization thereof with said H. B. Miller, C. K. Chancellor, and Joseph Moss in good faith; and in consideration of the deed of H. B. Miller, Mary L. Miller, C. K. Chancellor, and Joseph Moss of the land above set forth and described in plaintiff's complaint, the said Solomon Abraham and Julia Abraham, his wife, executed and delivered to the said association, for the benefit of all the members thereof, including the plaintiff's grantors, as plaintiff well knew, their certain deed of conveyance, duly witnessed and acknowledged, and which deed was afterwards duly recorded in the office of the county clerk of said county, by plaintiff's said grantors, for the benefit of said association, to all the following described real estate, viz: (Here follows descrip-

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tion of lands attempted to be conveyed by Abraham to the association.) That at the same time, T. P. Judson and Jennie Judson, his wife, in consideration of the deed of plaintiff's said grantors to said Grant's Pass Real Estate Association of the land above set forth and described in plaintiff's complaint, for the benefit of defendant and other members thereof, also executed and delivered to said association their certain deed in writing, conveying to said association, for the benefit of all the members thereof, all the following-described pieces and parcel of land, viz.: (Here follows description of lands attempted to be conveyed by T. P. Judson, to the association.) That said T. P. Judson executed said deed in good faith and for the purposes for which said association was formed by said H. B. Miller, C. K. Chancellor, Joseph Moss, Solomon Abraham, and T. P. Judson. That said H. B. Miller and C. K. Chancellor, Joseph Moss, Solomon Abraham, and T. P. Judson, acting as said Grant's Pass Real Estate Association, and each individual member thereof for himself, did, on the fourteenth day of July, 1885, make, execute, and cause to be recorded in the office of the county clerk of Josephine County, their certain power of attorney, making and constituting A. A. Porter and C. K. Chancellor, two of the defendants herein, the attorneys in fact for each of said parties constituting said Grant's Pass Real Estate Association, giving full power and authority to said attorneys in fact to sell the real estate of said association, to make contracts with purchasers of said property, and to receive payments thereon, and to do all things necessary in connection with selling and binding the conveyance of the same. That J. Bourne, Jr., is the successor in interest of Solomon Abraham in the property of said association, by and through the assignment of said Solomon Abraham. Wherefore, defendants pray the court for a decree setting aside, canceling, and forever annulling the deed from H. B. Miller and Mary L. Miller and C. K. Chancellor and Joseph Moss, to John F. Kelley, and that this suit be dismissed, and for costs and disbursements, and for such other and further relief in equity as to the court may seem meet and proper.

There were some other matters set up in the answer, but they were on motion stricken out. The reply denies the allegations of the answer. The evidence was taken in writing in the court below, and accompanies the transcript. The entire case is therefore before us for examination.

Without particularly noticing the evidence offered on the part of the plaintiff, it may be sufficient to say that it would entitle the plaintiff to the relief demanded, unless his right thereto is defeated by the new matter set up in the answer, and the evidence offered in support thereof. Our attention, therefore, will be first directed to that part of the case.

1. Among other items of evidence offered by the defendants is an agreement in writing signed by Solomon Abraham, H. B. Miller, C. K. Chancellor, Joseph Moss, and T. P. Judson, dated July 11, 1885, whereby the Grant's Pass Real Estate Association was formed. The substance of that agreement is as follows: "Know all men by these presents, that the undersigned, Solomon Abraham, H. B. Miller, C. K. Chancellor, Joseph Moss, and T. P. Judson, all residents and citizens of the State of Oregon, have, for mutual benefit and profit, formed, and by these presents do form themselves into an association, under the name of 'The Grant's Pass Real Estate Association.' The purposes of this association are, and shall be, *in the name and for the use and benefit of said association*, to buy, purchase, own, hold, improve, lease, sell, mortgage, and convey real property, lands, and tenements in and adjoining the town of Grant's Pass, in Josephine County, State of Oregon; and to do and perform all and every act and thing in and about the premises requisite and necessary for the purposes above mentioned. In all purchases, sales, and proceeds of the same, leases, rents, and profits, of property hereunder required, sold, leased, or conveyed, the interest of the respective parties to this instrument and agreement shall be as follows, unless otherwise expressly stated and specified to the contrary; that is: The interests of Solomon Abraham shall in all things herein mentioned be seven fourteenths; the interest of H. B. Miller, C. K. Chancellor, and Joseph Moss together shall be six fourteenths; and the interest

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of T. P. Judson shall be one fourteenth. This contract and agreement shall go into effect upon the full and final signing of the same." It was signed and sealed by all the parties thereto, on the day above specified.

On the fourteenth day of July, 1885, T. P. Judson and wife made a deed to the Grant's Pass Real Estate Association, whereby they attempted to convey certain real property in the town of Grant's Pass to said association. On the same day H. B. Miller and wife, Chas. K. Chancellor, and Joseph Moss made a like deed to certain other real property in said town to said association; and on the thirteenth day of July, 1885, Solomon Abraham and wife made a deed to said association, attempting to convey to it another parcel of land situated in said town. On the sixteenth day of January, 1886, Solomon Abraham and wife conveyed all their interest in the real property of the Grant's Pass Real Estate Association to the defendant Jonathan Bourne, Jr.; and on the twenty-fourth day of August, 1886, H. B. Miller and wife, C. K. Chancellor, and Joseph Moss conveyed to the plaintiff the same real property which they had theretofore included in their deed to the Grant's Pass Real Estate Association. The land described in this last-named deed is the only land in controversy in this suit.

It is claimed by appellant's counsel that a deed without a grantee named therein is simply void, and that the attempted conveyance to the Grant's Pass Real Estate Association was ineffectual to create any interest whatever in the real estate attempted to be conveyed, either in the association collectively, or the individuals composing it. To sustain his contention he cites these cases: *German Land Association v. Scholler*, 10 Minn. 331; *Sloane v. McConahy*, 4 Ohio, 157; *Jackson v. Cory*, 8 Johns. 385; *Trustees Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1; *Kain v. Gibboney*, 101 U. S. 362; *Zeissweiss v. James*, 63 Pa. St. 465; *Harriman v. Southam*, 16 Ind. 190; *White v. Howard*, 46 N. Y. 145; *Bundy v. Birdsell*, 29 Barb. 31; *Marz v. McGlynn*, 88 N. Y. 357; 3 Washburn on Real Property, 264, 265. Many of these cases hold, in effect, that a voluntary association of persons unincorporated have no legal capacity to take

or hold real property. And it is elementary law that in every deed or grant there must be a grantee named or be ascertained by description so as to distinguish him from all others. (*Simmons v. Spratt*, 20 Fla. 495; *Jackson ex dem. Potter v. Sisson*, 2 Johns. Cas. 321; *Webb v. Den*, 17 How. 576; *Thomas v. Inhabitants of Marshfield*, 10 Pick. 364; *The Ministers and Elders v. Veeder*, 4 Wend. 497; *Douthitt v. Stinson*, 63 Mo. 263; *Winslow v. Winslow*, 52 Ind. 8.) But under the facts disclosed by this record, it is not perceived how these authorities aid the plaintiff. Without the contract of July 11, 1885, they would be conclusive as to the invalidity of the deeds; but that contract, we think, renders them inapplicable. It is contended by defendants' counsel that the signing of the agreement of July 11th made and constituted the parties and associates therein partners, under the firm name of "The Grant's Pass Real Estate Association," for the purpose therein defined.

2. A partnership is defined to be a combination by two or more persons of capital, labor, or skill, for the purpose of business for their common benefit (*Parsons on Partnership*, 6); or in the language of another author: "A partnership, often called a copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them" (*Story on Partnership*, § 2); or in the language of still another eminent American author: "A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions." (3 *Kent Com.* 23.) As to whether the persons signing this agreement were partners *inter se* depends on the intention of the parties to be gathered from the contract. (*Lintker v. Millikin*, 47 Ill. 178; *Niehoff v. Dudley*, 40 Ill. 406; *Stevens v. Faucet*, 24 Ill. 483; *Robbins v. Laswell*, 27 Ill. 364; *Culler v. Estate of Thomas*, 25 Vt. 73.) This agreement contains every essential element to constitute a partnership, and such was its manifest

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purpose. It is true it is not declared in so many words in the agreement itself that such was its purpose, or that such should be its effect; but this was not necessary. The court will declare the legal effect of the agreement. And in this case it was to constitute the parties signing it partners *inter se*, for all of the purposes specified in the writing.

3. But it is claimed on the part of the appellant that conceding this to be so, it does not help the respondents; that the attempt to convey to them by their firm name of "The Grant's Pass Real Estate Association," transferred no interest, either legal or equitable, to the individuals composing the firm, in the real estate included in said deeds. It is not questioned but what partnerships may be formed and exist in this State for the purpose of buying, selling, leasing, and improving real property, or to do any of the things specified in this writing; but the plaintiff's contention is as to what is the proper form or method for carrying into effect such projects. The only objection suggested or urged against the method which appears to have been adopted in this case is, that the persons composing this firm could not acquire an interest in real property in their firm name. "Every partnership should have its proper name or style. It may be whatever name the partnership chooses; and this name need not be prescribed in the articles or determined upon by express agreement." (Parsons on Partnership, 137.) "The law does not require that it should contain the names of all (*Le Roy v. Johnson*, 2 Peters, 297), or any of the partners. It may be a name appropriate to a corporation, as the 'Citizens' Bank,' the 'Union Towing Co.,' . . . or, indeed, any name that the parties see fit to give it, and may change it *ad libitum*." (1 Collyer on Partnership, 287, n. 3.) So in *Crawford v. Collins*, 45 Barb. 269, it is said: "This action was properly brought in the individual names of the plaintiffs; they were the persons who composed the firm known as the 'Union Towing Co.,' the real owners of the debt, and the legal holders of the bond. The parties to a partnership may give it just such name as they please, and all contracts, obligations, or notes, made or given to such firm, may be prosecuted in the individual names of its members."

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The question is therefore presented for our consideration whether or not the deeds made to the Grant's Pass Real Estate Association vested in the partners composing that association any title, either legal or equitable, to the lands described in said deeds. In other words, is a deed to a partnership by its firm name void? This question must be determined by a reference to the authorities. In *Ferris v. Blackledge*, 71 N. C. 492, the deed had been made to "Murray, Ferris & Co.," and not to the partners by their individual names, and it was held that the deed for land was not for that reason void any more than a bond for the payment of money was; that it was a latent ambiguity, which might be explained by parol. It was further said that this mode of making a deed is a careless one, and might be insecure, but the deed was not void. So in *Sherry v. Gilmore*, 58 Wis. 324, the same principle is announced. In that case the deed was made to "Gilmore & Ware," and the court held that a firm name is always held sufficient to designate the true name of all the persons composing the firm; that there did not seem to be any reason for holding that a partnership in making a purchase of real estate for the benefit of the firm might not do so in the same manner that they made their other purchases, viz., in the firm name; and to sustain this view the court cited: *Shaw v. Loud*, 12 Mass. 447; *Stroman v. Rattenbury*, 4 Desaus. Eq. 267; *The Lady Superior v. McNamara*, 3 Barb. Ch. 380; *Newton v. McKay*, 29 Mich. 1; *Staak v. Sigelkow*, 12 Wis. 234-242; *Hogg v. Odom*, Dud. (Ga.) 185; to which may be added *Morse v. Carpenter*, 19 Vt. 613. So in a recent English treatise (*Rules for the Interpretation of Deeds*, by Howard Warburton Elphinstom, p. 126) the same rule is thus stated: "Where a firm is made a party to a deed, evidence is admissible to show who in fact constituted the firm at that time." (Lindley on Partnership [4th ed.] 208; *Carruthers v. Sheddon*, 6 Taunt. 14; *Maughan v. Sharpe*, 17 Com. B. N. S. 443; *Pristwick v. Poley*, 43 Law J. Com. P. N. S. 190.)

The general tendency of these authorities is to hold that the name of a partnership is nothing more than a conventional mode

Points decided.

of designating the persons composing the firm, and that such firm may transact all the partnership business in the firm name. Still I have been unable to find an adjudged case where it has been held that a partnership might take the title to land in its firm name, when such firm name did not contain the surname of one or more of the partners. But under any view of the subject, such firm could contract for the purchase of land in its firm name, and if the deeds read in evidence were ineffectual as conveyances of the legal title to the firm, they were valid and binding as contracts to convey, and created an equitable estate in the land described. This equity defeats the plaintiff's suit. Under these deeds this land in equity is a partnership property, and must be dealt with as such.

It follows that the decree of the court below must be reversed, and the suit dismissed, without prejudice to any other remedy which any of the parties may wish to pursue.

[Filed December 14, 1887.]

**ROBERT PHIPPS ET AL., RESPONDENTS, G. A. TAYLOR
AND H. C. SLOCUM, APPELLANTS.**

REPLEVIN—VERDICT—JUDGMENT.—In an action of replevin, a verdict is insufficient to authorize a judgment for either party which finds that the plaintiff is entitled to three fifths of each and every pile of lumber described in complaint, or the value thereof, and that the remainder belongs to plaintiffs. Replevin will not lie for an undivided part of a number of piles of lumber. (*Guille v. Wong Fook*, 13 Or. 577, approved and followed.)

SAME.—When the plaintiff alleged that he was the owner and entitled to the possession of the property in controversy, which allegations were denied, a verdict is insufficient to authorize a judgment which is silent as to the ownership of the property. It leaves that issue undetermined.

ALTERNATIVE JUDGMENT.—In an action of replevin, a plaintiff is only entitled to an alternative judgment upon a verdict in his favor, if the property has not been delivered to him. If, during the progress of the action the property has been delivered to him, a judgment in his favor settles his right to it, and it then being in his possession, the alternative judgment is unauthorized. (Hill's Code, § 214.)

SAME.—In said action, the plaintiff may recover distinct parcels, or a part of the separate articles sued for, and the defendant prevail as to the others; but he cannot recover undivided portions of entire and distinct lots.

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COSTS—SECTION 549 OF HILL'S CODE.—Costs are allowed, of course, to the plaintiff upon a judgment in his favor; but if in such action he recover property or the value as established on the trial, and damages for detention, in all less than fifty dollars, he shall recover no more costs and disbursements than the sum of such value and damages.

APPEAL from Douglas County. **Reversed.**

J. W. Hamilton, for Appellants.

W. R. Willis, for Respondents.

STRAHAN, J.—This is an action of replevin. The property sought to be recovered is fifty-five thousand feet of lumber piled in the mill and mill-yard at Gurney's Mill, in Douglas County, Oregon. The lumber was distributed in from twelve to fifteen separate piles, and each lot is particularly described in the complaint, and the entire quantity is alleged to be of the value of five hundred dollars. The defendants allege in their answer, after denying the taking as wrongful, and denying each of the other allegations specifically, that G. A. Taylor at said time was sheriff of Douglas County, Oregon, and the other defendant was his deputy; that at said time one William Trask was the owner of about thirteen thousand feet of said lumber, and Voltair Gurney was the owner of the residue. The answer then alleges facts showing a seizure of Voltair Gurney's interest in all of said lumber, under and by virtue of an execution against him and G. W. and R. M. Gurney, issued out of the Circuit Court of Douglas County, Oregon, in favor of William Trask, for \$117.50, with interest and costs. The answer demanded a return of the whole of said property to the defendants, which had been replevied from them soon after said action was commenced. The reply denied that either Trask or Gurney owned any part of said lumber. Upon a trial before a jury, the following verdict was returned: "We the jury in the above-entitled cause find that the defendants are entitled to the following described property in the plaintiffs' complaint described, to wit: (3-5) Three fifths of each and every pile or clear of lumber described in plaintiffs' complaint, or its value thereof, and remainder belongs to the plaintiffs."

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Upon the return of this verdict the defendants moved for judgment in their favor, and against the plaintiffs for the return of all of said lumber, or for the sum of three hundred dollars, the value thereof, in case delivery could not be had, and for costs and disbursements. At the same time the plaintiffs moved for a judgment in their favor for two fifths of each pile of lumber described in the complaint, or for the sum of two hundred dollars, the value thereof, in case delivery could not be had, and for costs and disbursements. The court rendered a judgment in favor of the plaintiffs as requested in their motion, and taxed their costs at \$94.17. The court then rendered a further judgment in favor of the defendants and against the plaintiffs, to the effect that they recover a judgment against Robert Phipps and Cyrus Smith; that they are entitled to the possession of three fifths of the property described in the plaintiffs' complaint, or its value, to wit, three hundred dollars, and that execution issue therefor. From this judgment defendants have appealed to this court. There is no bill of exceptions in the record, and there is no question of law presented by the pleadings. The only question discussed on the argument was what judgment ought the court to have rendered, if any, on the verdict of the jury.

1. The first inquiry to which our attention must be directed is whether the verdict was sufficient to enable the court to render any judgment in the cause in favor of either party. Hill's Code, section 214, prescribes, in substance, what the verdict shall contain in this class of actions as follows: "In an action for the recovery of specific personal property, *if the property has not been delivered to the plaintiff*, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof," etc.

In this action the plaintiffs claimed to be the owners, and to have the right to the possession of the entire property in controversy; but it appears from the verdict of the jury that they were only entitled to the possession of an undivided part thereof. This part had not been separated or severed from the entire lots

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or piles, but included an undivided portion of each. In such case replevin will not lie. (*Kinny v. Green*, 32 Mich. 310; *Price v. Talley's Adm'r*, 18 Ala. 21; *Parsons v. Boyd*, 20 Ala. 112; *Kimball v. Thompson*, 4 Mass. 441; *Hart v. Fitzgerald*, 2 Mass. 509; *Lacy v. Weaver*, 49 Ind. 373; *Alwood v. Ruckman*, 21 Ill. 200; *Parker v. Garrison*, 61 Ill. 250; *Sargent v. Courrier*, 66 Ill. 245; *Guille v. Wong Fook*, 13 Or. 577.) Upon the point now under discussion, we might well have placed our decision on the authority of *Guille v. Wong Fook*, *supra*, alone. It is decisive of the point as to the insufficiency of this verdict to authorize a judgment in favor of the plaintiff. In that case the plaintiff brought replevin for "sixty-eight head of hogs on the macadamized road in said county, on the place formerly kept by Wong Fook;" and the jury found that the plaintiff was entitled to "that portion of the property described in the complaint, to wit, forty-nine hogs." This verdict was insufficient to support a judgment for forty-nine of the hogs described in the complaint.

2. But this verdict is insufficient for another reason. By the complaint the plaintiffs claimed to be the owners of the lumber in controversy, as well as to be entitled to its possession. The verdict is silent as to the ownership of the property, and that issue remains undetermined. In such case no judgment can be rendered for the plaintiffs. (*Bemus v. Beekman*, 3 Wend. 668; *Emmons v. Dowe*, 2 Wis. 235; *Heeron v. Beckwith*, 1 Wis. 27; *Beemis v. Wylie*, 19 Wis. 318; *Appleton v. Barrett*, 22 Wis. 568; *Machette v. Wanless*, 1 Colo. 225.)

3. But if the verdict had been in proper form, the judgment is erroneous. By the express provisions of the Code (§ 214, *supra*), the plaintiff is only entitled to the alternative judgment if the property has not been delivered to him. If during the progress of the action it had been delivered to him, and the finding is in his favor as to the title to the property when that is in issue, and the right to the possession, the judgment is that he recover the particular property, and in a proper case his costs. The property being then in his possession, and his right and title conclusively settled by the judgment, there is no occa-

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sion or authority for an alternative judgment. (*Merill v. Butler*, 18 Mich. 294; *Blackwell v. Acton*, 18 Ind. 425; *Ward v. Masterson*, 10 Kan. 77; *Fitzhugh v. Wiman*, 9 N. Y. 559.)

4. Inasmuch as there must be a new trial in this case, I think proper to add that we must not be understood as holding that in an action of replevin the plaintiff may not recover some of the separate articles or distinct parcels of the property in controversy, and the defendant prevail as to others; but they must be separate and distinct articles or parcels, capable of description and identification, and not undivided portions of separate or entire and distinct lots. (*Pratt v. Tucker*, 67 Ill. 346; *Williams v. Beede*, 15 N. H. 483; *O'Keefe v. Kellogg*, 15 Ill. 347; *Poor v. Woodburn*, 25 Vt. 234; *Powell v. Hinsdale*, 5 Mass. 342; *Edelen v. Thompson*, 2 Har. & G. 31.)

5. Upon this appeal counsel discussed the question of costs to some extent, where the jury find for the plaintiff as to a portion of the property and for the defendant as to another portion. In the absence of a statute fixing the rule, the authorities seem to hold that in such case it would be the duty of the court to apportion the costs equitably between the parties. (*Powell v. Hinsdale*, *supra*; *Poor v. Woodburn*, *supra*); but our statute provides in what cases parties recover costs. (Hill's Code, § 549.) Under that section costs are allowed to the plaintiff, of course, upon a judgment in his favor, among other cases, in an action for the recovery of personal property; but in such action, if the plaintiff recover property, or the value thereof, as established on the trial, and damages for the detention of the same, in all less than fifty dollars, he shall recover no more costs and disbursements than the sum of such value and damages. Section 551 of Hill's Code allows costs to the defendant, of course, in the actions enumerated in section 549, "unless the plaintiff be entitled to costs therein." Under these sections there is no room for a division of costs. They belong of right to one party or the other, to be determined by the court as the facts appear.

Let the judgment be reversed, and the cause remanded to the court below for a new trial.

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[Filed December 19, 1887.]

**B. A. OWENS ADAIR, RESPONDENT, v. DAVID LENOX,
APPELLANT.**

NEGOTIABLE PAPER—DEFENSE TO ACTIONS UPON.—The maker of a negotiable promissory note cannot defend against an action thereon in favor of an indorsee for value, on the ground that it was paid to a former indorsee, even though the transfer to the plaintiff in the action was made after the note was due.

SAME.—The rule that the transfer of an overdue note is made subject to all equities existing between the original parties does not extend to matters arising subsequent to the making of the note, and not affecting the contract, as originally made.

SAME.—A note once negotiable remains so until it is paid; the fact that it becomes overdue does not destroy its negotiability.

SAME.—It is the duty of the maker of such paper to see to it that the payee has it in possession, and to take it up when he pays it.

APPEAL from Douglas County.*W. R. Willis, for Respondent.**J. C. Fullerton, and J. W. Hamilton, for Appellant.*

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Douglas. The respondent brought an action in that court against the appellant upon a promissory note for \$324.16, executed by the appellant January 2, 1886, payable to the order of Caro & Brothers, at Roseburg, Douglas County, Oregon, one day after date, with interest at ten per cent per annum, and indorsed by them on the sixth day of July, 1886, to one W. F. Owens. Said Owens, on the twenty-third day of July, 1886, indorsed the note to the respondent. The defense interposed by the appellant was payment made by him to said W. F. Owens on the twenty-fourth day of August, 1886. The case was tried by jury, who rendered a verdict for the respondent for the amount of the note and interest, and upon which the judgment appealed from was entered.

The main question in the case is, whether the payment to W. F. Owens, conceding the transaction between the appellant and Owens would have amounted to payment had the latter at the time been the holder of the note, constituted a legal payment of the note. The respondent testified, as a witness in the case, that

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on the twenty-third day of July, 1886, she signed a note for five thousand dollars as security for said W. F. Owens, and that he got the money on it, and gave her the note in suit, with other notes, as security for anything she might have to pay on the five-thousand-dollar note; that she afterwards had to pay the latter note; that the first time she notified the appellant that she owned the note in suit, or gave him any notice regarding it, was on the eighth day of November, 1886. Simon Caro, one of the firm of Caro & Bros., testified that he indorsed the note in suit to W. F. Owens for collection, which was the only interest said Owens had in it. The appellant testified that he paid the note sued on to W. F. Owens in full, by hauling him his crop of wheat for the year 1886; that he finished hauling along about the latter part of August of that year; that the reason that he did not take the note up immediately, or at least demand it, was because Owens told him he had the note from the Caros, and he paid it, not doubting but that it was all right to pay it; that he had no notice that respondent claimed any interest in it, until along in November, 1886, when her attorney wrote to him about it.

The court instructed the jury to the effect that any payment made upon the note to W. F. Owens, after he transferred it to respondent, was no defense, and refused to instruct them that, in case the transfer was made to respondent after it became due, the appellant was entitled to notice of it; and that if, before notice of the transfer, the appellant paid the amount of the note in payment thereof to W. F. Owens, it was a defense to the action. To the instruction given, and refusal to give the others respectively, the appellant's counsel saved an exception, which presents the matter to be determined.

The whole question resolves itself into this: If the payee of a negotiable promissory note indorses it to a third person after it becomes due, and the latter subsequently indorses it, for value, to a holder, will a payment by the maker to such third person, intended as a payment of the note, made after his indorsement to the holder, but without notice thereof, constitute a valid payment of the note? The counsel for the appellant contends that

it will, and he relies, I think, entirely upon the provision contained in section 28 of the Civil Code of this State, which reads as follows: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

The counsel has cited a number of cases from the different States in which a similar provision of statute has been adopted, in which it has been construed as applicable to promissory notes transferred after due. That construction has been adopted in the cases referred to by construing the negative words, "but this section shall not apply to a negotiable promissory note," etc., as implying the affirmative, that a negotiable promissory note or a bill of exchange, transferred after due, stands upon the same footing of an assignment of a thing in action; and in an action by the holder, shall subject the same to any set-off, etc., "existing before notice of the transfer." But I am not willing to assent to that view. The cases referred to, in my opinion, were not well considered. In order to ascertain how far a negative provision implies an affirmative one, its nature and object must be inquired into. Section 27 of the Civil Code of this State, provides that "every action shall be prosecuted in the name of the real party in interest," except in some particular cases referred to therein. Mr. Pomeroy, in commenting upon the two sections, says they do not change existing law as to defenses under the circumstances mentioned therein. Taking the two together, the plain interpretation of them is that the "assignee of a thing in action must sue upon it in his own name, but this change in the practice shall not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defenses against the assignee who sues which they would have had if the former rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defenses." In other words, the section must be interpreted as though it read as follows: "In the case of the assignment of a thing in action,

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the action of the assignee shall be without prejudice to any set-off, or other defense (now allowed) existing at the time of, or before notice of the assignment, which would have been available to the defendant had the action been brought in the name of the assignor." This construction, he says, is now firmly and universally established. (Pomeroy on Rem. & R. R. § 156.)

The holder of negotiable paper does not acquire the right to sue on it in his own name from the provision of the statute referred to; he has always had that right since the statute of Anne. The legal title to the instrument, although negotiated after maturity, is transferred to the holder, by indorsement, when payable to order, and by simple delivery, when payable to bearer. Said provision, notwithstanding the negative words referred to, could not have been intended to apply to negotiable paper, whether transferred before or after due. Because the provision is not made applicable to such paper when transferred "in good faith, and upon good consideration before due," it does not necessarily follow that it is applicable to such paper when transferred after due, any more than the clause in section 27, referred to, which says: "But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract," implies that things in action not arising out of contract are non-assignable, although it seems to have confused some of the courts, in the outset of the Code practice, upon that question. But now it is universally held that any claim affecting the party's estate, although it be a pure tort, is assignable. The Code was not intended to change general rules of law; the codifiers only had in view a simplification of the rules of practice, and it was adopted to effectuate that purpose. In order to determine, then, the question involved, we must examine the general rule upon the subject, as established by judicial wisdom, and not resort to any refined construction of Code practice.

The rules of law applicable to cases of assignment of things in action never included the transfer of negotiable paper, whether negotiated before or after it became due. Such paper does not lose its negotiable character after it matures. Its quality in that

particular depends upon the form of the obligation. If it be a written promise of one party to pay to the order of another, or to bearer, a specified sum of money, at a certain designated time, it is negotiable always; and when the payor desires to discharge his obligation, by payment, he must find the legal owner or holder, and pay him, unless he has taken the precaution to make it payable at a particular place. This is an elementary rule. Paying it to some one who had been the holder, but who had prior to the time of the attempted payment negotiated it for value to another person, cannot, it seems to me, upon any rule or principle be considered payment. Not having had notice of the transfer is no excuse. Payment and delivery up of the note for cancellation are concurrent acts. A holder will not ordinarily be entitled to have judgment entered upon such an instrument, without bringing it into court to be canceled.

The appellant had the right to demand of Owens an inspection of the note before paying it. He should have done that. He could not otherwise know that Owens had it, and then he should have been certain that it had been regularly indorsed to him by the payees thereof. No prudent person would pay such an obligation and leave it outstanding, or pay it to an indorsee without knowing that he had possession of it at the time. Daniel, in his work on Negotiable Instruments, lays it down as elementary, that the payor, in making payment after maturity, must be sure that it is made to the then holder; for he says: "If it should have been transferred after maturity, and before payment, to a third party, a payment to the transferrer would be invalid, and the transferee holding the instrument could himself enforce payment." And he cites *Davis v. Miller*, 14 Gratt. 1, which is in approval of *Baxter v. Little*, 6 Met. 7, as authority. (Daniel on Negotiable Instruments, § 1233 a.) This view, to my mind, is fully supported by principle and authority. The rule existed long before the adoption of the Code, and I do not think it was intended to be abrogated by it. The question as to the extent of W. F. Owens' interest in the note, I do not think material. The payees clothed him with the *indicia* of ownership of it, and if he

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procured credit on the strength of it they ought not to be heard to complain.

The judgment appealed from must be affirmed.

LORD, C. J., absent.

[Filed December 19, 1887.]

ROBERT PHIPPS, RESPONDENT, v. JOHN RIELEY,
APPELLANT.

GARNISHEE—DUTY OF, IN ANSWERING.—If a garnishee knew that the debt sought to be garnished had been assigned to another, and neglected to plead such assignment in his answer, or to defend himself against the claim set up against him in the garnishment proceedings, neither the fact of such garnishment nor the judgment rendered against him under the proceeding will constitute a defense to a suit brought against him by the assignee, to whom the debt had been assigned prior to said attempted garnishment.

NOTICE OF ASSIGNMENT—WHEN EFFECTUAL.—Notice of assignment at any time before the filing of his answer, or even before judgment, will impose the duty on the garnishee of setting up such assignment.

GARNISHEE—HIS DUTIES.—The garnishee is entirely indifferent between the parties, and he can properly do nothing to aid either party to the litigation; but he must act for his own protection, and plead that the debt attempted to be garnished has been assigned whenever he has notice of it.

APPEAL from Douglas County. Affirmed.

J. W. Hamilton, for Appellant.

W. R. Willis, for Respondent.

STRAHAN, J.—This is a suit in equity to foreclose a mortgage on certain real property in Douglas County. The amount of the note secured by said mortgage is \$1,450, due October 1, 1885. The note was originally payable to one Harrison Allen; but plaintiff alleges that on the twenty-fourth day of October, 1885, he purchased the same for a valuable consideration, and that said Allen indorsed and delivered said note and mortgage to him. The answer denies the assignment, and then alleges that said sum of money mentioned in said note is a part of the purchase price of said mortgaged premises; and that Allen had conveyed said premises to the defendant by deed of general

15 494
23 601
16* 185
32* 756

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warranty; that Allen had, on the seventeenth day of November, 1884, given another mortgage on the same premises to secure the payment of a note to E. G. Young & Co., for \$460.77, and agreed with defendant to pay off said note before the note now sued upon should become due, and that if he failed to pay off said note to Young & Co., then said note should constitute a set-off to, and be deducted out of the note and mortgage sued on; that said Allen failed to pay said note to Young & Co., and that said note and mortgage belongs to one James Rieley, who has commenced suit thereon with \$75 as attorney's fees. Another allegation in the answer states that Allen agreed to leave wheat on the premises to the amount and value of \$32.50, which he failed to do. Another separate defense alleged is, that on the twenty-sixth day of October, 1885, W. T. Kerley recovered a judgment against H. Allen for \$414.59, and issued an execution thereon, and on the twenty-fourth day of November, 1885, the defendant was garnished for all he was owing said H. Allen; that on the twenty-first day of November the defendant made answer in writing to the sheriff, stating in effect the execution of the note now sued on; that this defendant had a defense thereto to the amount and for the items already stated, and that he had no knowledge whether said Allen had transferred said note or not; that said Kerley had commenced an action to recover the amount claimed in said execution, and that said action was still pending and undetermined.

This defense was on motion of the plaintiff stricken out. Another defense stated that this suit is prosecuted for the use and benefit of Harrison Allen, and with the intent to cheat, overreach, and defraud the defendant out of the amount of the Young & Co. note, the value of said wheat, and any and all sums of money which he may be compelled to pay on account of said garnishee process. The reply denied all new matter in the answer, and the cause was referred, and the evidence all taken in writing. Upon a trial the court found the issues for the plaintiff, and rendered a decree for the sum of \$1,036.12, with costs, from which decree this appeal is taken.

1. On the part of the plaintiff the evidence in this case

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satisfies us that on the twenty-second day of October, 1885, Harrison Allen, for a valuable consideration, sold and assigned the note and mortgage sued on to the plaintiff. The execution of said note and mortgage being admitted, the plaintiff is entitled to a decree of foreclosure, unless his right is defeated by some of the matters insisted upon by the defendant.

2. The striking out of the portions of the defendant's answer setting up his garnishment at the suit of W. T. Kerley is the first question to which our attention will be directed. Counsel for appellant claim that the facts pleaded in this part of the answer constituted a defense, and that such matter was not sham, frivolous, or irrelevant.

Duty and liability of garnishee. The court did not err in striking out of the answer all that part of it which related to the garnishment of the defendant. At the time the defendant filed his answer, he knew that the note sued on had been assigned to the plaintiff, and that such assignment was alleged to have been made prior to the garnishment. In such case it was his duty to set it up in his answer, and if he fails to do so, or to fully defend himself against the claims set up by the garnishment, neither the fact of garnishment, nor a judgment rendered against him under the proceeding, will be any defense to a suit brought by the holder of the note, to whom it had been assigned prior to such garnishment. In *Colvin v. Rich*, 3 Port. 175, it was held that if "the maker of a note or bond, with knowledge before he made his answer upon garnishment that it had been transferred, acknowledge in his answer that he owed the debt to the payee or obligee, he would be as clearly and justly liable to pay the whole amount to the assignee, as he would after a voluntary payment to the payee or obligee himself. The object of an attachment and garnishment against a debtor of the defendant in attachment is to obtain a transfer by a judgment of the right of the defendant to what his debtor owes him; and such would be the effect of a judgment in such a case; but if the right had been transferred before the attachment issued, there would be nothing for the plaintiff in the attachment to acquire—certainly nothing which he ought to acquire; and if the garnishee

had notice of the transfer before he makes his answer, the demand by the attachment and garnishment of the debt no more impairs his obligation to pay it to the assignee than an application made by the payee, for payment, to the debtor, with such notice, would."

So in *Foster v. White*, 9 Port. 221, the same principle is announced: "It was not only his privilege, but it was a duty imperative on him, at any time before final judgment, to make known that he had received notice of the transfer of the notes." So, also, in *Cross v. Haldeman*, 15 Ark. 200, it was held that if a garnishee was notified at any time before final judgment that his note had been assigned before the service of the writ upon him, he is bound to apply for leave to interpose the defense. And in discussing the liability of a garnishee, Waples on Attachment (p. 210), says: "He is not liable in garnishment, though he may have had no notice of the assignment up to the time of the summons. Subsequent notice, received before filing his answer, will enable him to set up the fact of transfer, and escape judgment against him as garnishee." And 2 Wade on Attachment, section 472, is to the same effect. And it is expressly held in *Hill v. Blatchford*, 2 Ind. 184, that the commencement of a suit by the assignee of the debt sought to be garnished was notice to the defendant of the assignment, and that such notice was in time to have enabled the defendant to defeat the attachment. This view renders it unnecessary to consider or decide the difference as to the effect of the indorsement of an overdue negotiable promissory note and the assignment of an ordinary *chose in action*, where the original maker or debtor is sought to be subjected to the process of garnishment. Payment to an indorsee of such paper, after he has parted with his interest by indorsement, without notice to the maker of the fact that the paper was held by another, would be invalid, and constitute no defense against the true holder (*Adair v. Lenox*, decided at this term); and it is not perceived how an attaching creditor could by his attachment acquire any other or greater interest in the debt attached than the defendant in the attachment had therein at the time of the attachment or garnishment. (*Dix v. Cobb*, 4

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Mass. 508; *Gruntree v. Rosenstock*, 61 N. Y. 583; *Cooper v. McClun*, 16 Ill. 435; *Barnard v. Hobbe*, 54 N. Y. 516.)

It was clearly the duty of the garnishee, as soon as he had notice that the note had been assigned, to set it up by way of defense. The law regards him as entirely indifferent between the parties—some of the authorities call him a stakeholder—and he can properly do nothing to aid either party to the litigation; but for his own protection, whenever he has information or reason to believe that the debt owed by him, and which is evidenced by an overdue negotiable promissory note, has passed to another by indorsement or delivery, where the note is payable to bearer, he must set up the fact in his answer. The plaintiff in the garnishee proceedings can then controvert it, or allege any new matter by way of avoidance if any such facts exist, and thus the facts upon which the right depends be subjected to a proper trial. In such case it is neither safe nor proper for the garnishee to set up that the indorsement is colorable, collusive, or even fraudulent. He has no interest in those questions. His sole interest is to ascertain who is the legal holder of his paper, to whom he may lawfully make payment.

3. Something was said by counsel as to the proper practice in case a defendant is sued by one claiming to be an assignee, and he should be garnished for the same debt, and both proceedings be pending at the same time. There are some authorities which hold that in such case the pendency of the garnishee proceedings will abate the action on suit by the assignee; but these are evidently not the best considered cases. When both proceedings are pending in the same court at the same time, the better practice is for the court, by order, to stay one of them until the other shall have been finally heard and determined. These conclusions are reached with less reluctance in this particular case, for the reason that the defendant testified in substance that Kerley had agreed with him that he should lose nothing by the proceeding against him.

Let the decree of the court below be affirmed.

LORD, C. J., was not present at the trial of the action, and took no part in the decision.

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[Filed December 19, 1887.]

SARAH ZIGLER, ADM'R, RESPONDENT, v. D. C.
McCLELLAN, APPELLANT.

COUNTER-CLAIM, WHAT IS.—In an action upon a contract for money expended by a tenant in repairing a hotel, the owner of the building may defend by showing that the building was burned in consequence of the carelessness of the tenant.

EVIDENCE.—It is reversible error to exclude testimony tending to establish that fact.

PRACTICE.—NONSUIT.—MOTION FOR.—In the absence of a motion for a nonsuit by the defendant, or an instruction asked to that effect, the question as to the right of action by the plaintiff cannot be considered.

APPEAL from Douglas County. Reversed.

J. W. Hamilton, for Respondent.

W. R. Willis, for Appellant.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Douglas. The respondent, as administratrix of L. H. Zigler, commenced an action in said Circuit Court against the appellant, claiming in her complaint that between the fourth day of June, 1884, and the —— day of August of said year, the said L. H. Zigler, at the request of appellant, expended the sum of three hundred dollars in building an addition on the west end of the south part of the hotel building, known as the "Metropolitan Hotel," situated on the real property of appellant, known as lot 4, in block 29, in the city of Roseburg, which premises the appellant leased to said L. H. Zigler by written lease for the term of three years from June 4, 1884; that in consideration of said L. H. Zigler building said addition, appellant was to pay him therefor said sum of three hundred dollars, by allowing him out of the rent of said premises the rent to be due appellant for the months of July and September, 1884, the month of December, 1886, and of May, 1887; that on the 29th of August, 1884, without the consent of said Zigler, or his lawful successor, appellant took possession of said premises, and had ever since remained in possession thereof, by himself and grantee, and that he had failed to pay said sum of three hundred dollars as provided in said

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written agreement, or otherwise, and refused to do so, wherefore said respondent demanded judgment for said sum, and the interest thereon.

The appellant claimed as a defense to the action that by the terms of the written lease said Zigler was to pay appellant an annual rent of nine hundred dollars during the term of the lease; that it was payable monthly in advance; that he had the privilege of building the addition to the hotel building, and of retaining out of the rent three hundred dollars, the rent for the months specified in the complaint; that he entered into possession of the premises under the lease at the date thereof, and occupied them until August 19, 1884, and retained seventy-five dollars rent for July of that year; that Zigler so negligently, carelessly, and unskillfully managed and conducted the business in and about the hotel, and negligently and carelessly left a lamp burning, whereby and by means of which the hotel building, with the addition thereto, caught fire and was entirely destroyed, to appellant's damage of four thousand dollars; that said Zigler left said premises, and abandoned the lease, and refused and neglected to pay any further rent, and had ever since, without the fault of the appellant, failed to occupy the premises, or pay the rent, and that appellant took possession of the premises, the buildings having been destroyed by fire, and left and abandoned by Zigler and his lawful successor.

These were the material issues in the action, and had it not been that a bill of exceptions was sent up with the transcript, we would have caught but a slight glimmer of the facts of the case. The attorneys upon both sides seemed to have regarded the office of the pleadings as being to cover up the facts, as some French statesman did that of words, to conceal ideas. The respondent's cause of action was based upon a clause in the lease, which is not referred to in her complaint; and the appellant, in his answer, charges Zigler with having abandoned the premises, and refused to pay the rent, when the poor fellow had been burned to death in the fire.

The bill of exceptions contains a copy of the lease, which is in substance as follows: "This indenture, made on the fourth day

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of June, 1884, by and between D. C. McClellan, of the city of Roseburg, Douglas County, Oregon, of the first part, and L. H. Zigler, of the same place, of the second part, witnesseth, that the party of the first part hath letten, and by these presents doth grant, demise, and let unto the said party of the second part, the following described premises, to wit: Lot No. 4, in block No. 29, in the city of Roseburg, in Douglas County, Oregon, and known as the Metropolitan Hotel, with all the appurtenances thereunto belonging, for the term of three years, from the first day of June, 1884, at the yearly rent of nine hundred dollars, payable monthly in advance; . . . and at the expiration of said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And it is mutually agreed by and between the parties thereto, that the party of the second part shall make upon said premises the following improvements and repairs, to wit: Build an addition onto the west end of the south part of the hotel building now on said premises. . . . And the party of the first part agrees to pay to the party of the second part for said improvements the sum of three hundred dollars, in manner and payment as follows; that is to say, the party of the second part shall be allowed to and may retain out of the rents to be paid as aforesaid, the rents for the months of July and September, A. D. 1884, for the month of December, A. D. 1886, and for the month of May, 1887. And it is also further agreed that if the said party of the first part shall sell the premises thereby leased, he may at any time hereafter terminate this lease, and take possession of said premises, upon giving the said party of the second part one month's notice in writing of such sale, and of his desire to terminate this lease. *Providing*, also, that said party of the first part shall pay to the said party of the second part such sum as may remain unpaid of the three hundred dollars, the price of the aforesaid improvements, at the time of giving said notice."

It seems that after the said buildings were consumed by fire, Zigler's family were left destitute, and went to appellant's house

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to remain until they could make some shift; that appellant went upon the premises, and was offered a sum of money for the land, and sold it some four days after the fire occurred; that the family made no objection to the sale, and no steps were taken in reference to their using the land, or in view of complying with the terms of the lease. The parties who purchased the land soon afterwards erected another building thereon for other purposes than a hotel, and that this constituted all the abandonment of the premises upon the part of Zigler's representatives, or eviction by the appellant. The latter undoubtedly thought that the premises were necessarily thrown back upon his hands, and Mrs. Zigler, who has since been appointed administratrix of her husband's estate, had no idea of ever attempting to occupy them again under the lease.

The evidence, under the circumstances, would, I think, have authorized the jury to find that the premises were abandoned, and that there had been an acceptance of the abandonment. The court, however, it seems, refused to submit that question to the jury; and refused, also, to allow the appellant's counsel to offer proof of the hotel having been burned in consequence of Zigler's carelessness. This proof was clearly admissible. The substance of the lease is that Zigler was to have the use of the premises for three years, for seventy-five dollars a month rent. He was to build the addition, and four months of the rent was to be rebated in consideration thereof. And he was to surrender up the premises at the end of his term in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. These were mutual obligations between the parties, the agreement to let on one side, and agreement to pay the rent, build the addition, and use the premises properly on the other; and if Zigler were careless, negligent, or wilful in his treatment of the premises, he failed to perform his part of the contract, he violated the condition upon which they were let to him as much as though he had failed to pay the rent or build the addition; and any damages suffered by the appellant in consequence were a proper subject of counter-claim—it arose out of the transaction. Zigler's carelessness in his use of the prem-

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ises was no more a tort than appellant's would have been if he had wrongfully entered upon the premises and ousted the former, and yet that would have been a good counter-claim against any claim for rent that had accrued upon the premises in favor of the latter, as that would have been a violation of the implied covenant upon his part that the tenant should quietly enjoy the premises. Neither party could claim damages for a distinct tort committed by the other as a counter-claim in such a case. It is only where the tort is violative of some express or implied agreement, constituting a part of the transaction, that it can be rendered available as such claim.

Under the former practice, such counter-claims as the one interposed by the appellant in the action herein would have been recoupment. *Batterman v. Pierce*, 3 Hill, 171, illustrates the principle. There the plaintiff sued upon a promissory note, executed by the defendants and payable to the plaintiff. The defendants, under a notice for that purpose, proved that the plaintiff, just before the giving of the note, sold several lots of standing wood at auction. By the terms of the sale, the purchasers were at liberty to cut the wood and pile it on the land to dry, and were to have two seasons, that is, two winters and one summer, to take away the wood. The plaintiff had a piece of fallow ground adjoining the wood, and the bidders were apprehensive that the wood would be destroyed when the fallow should be burned. The plaintiff thereupon agreed that if anything occurred to the wood through his means, or by setting fire to his fallow, he would be accountable, and would guarantee the purchasers against any damages in consequence of burning his fallow. The sale thereupon proceeded, and the defendants purchased several lots of wood, and gave the note in question for the purchase money. The defendants cut and piled the wood they purchased. The next spring after the sale, the plaintiff set fire to and burned his fallow, and all the defendants' wood was burned up. There the act of the plaintiff in setting fire to his fallow, standing by itself, was a tort—was carelessness upon his part—as it endangered the safety of the defendants' property; and if he set the fire at an improper time, he would have been liable in damages

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for his negligence. That, however, of itself, would not have been a matter of recoupment, but of his agreement to guarantee the defendants against loss in consequence of the act, connecting it with the transaction of purchasing the wood and giving the note. So, here, Zigler's carelessness in causing the burning of the hotel, if he did occasion it, would not, of itself, be a matter of counter-claim; but in connection with the fact of his obligation that he would be prudent in his occupancy of the premises, and which constituted a condition of the letting, it is "a cause of action arising out of the contract, or transaction set forth in the complaint (or attempted to be set forth therein), as the foundation of the respondent's claim," within the meaning of the provision of the Civil Code relating to that subject. The respondent, as representative of L. H. Zigler, says to the appellant, in effect, "You have not complied with a provision of the lease, to my damage of three hundred dollars." The latter in turn says, "You have not complied with a provision of it either, to my damage of four thousand dollars." The law, to prevent a circuity of action, allows the latter claim to be counted upon in the same action, so that complete justice may be done between the parties in one suit. The case is in direct line of the cases in which cross-actions are permitted.

There are other questions in the case, but I do not think they materially affect its merits. The appellant's counsel intimated upon the argument that the respondent had no cause of action; that the contract for building the addition was incomplete when it burned up, and therefore the respondent had no right of action; citing *Filden v. Besley*, 42 Mich. 100. But in the absence of a motion for a nonsuit, or instruction of the court presenting that question, we have no right to consider it.

The judgment must be reversed, and the cause remanded for a new trial.

LORD, C. J., absent.

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[Filed December 19, 1887.]

JOHN STANLEY, RESPONDENT, v. CYRUS SMITH
ET AL., APPELLANTS.

15	505
133	195
15	506
35	291
15	505
36	210
15	505
47	245

EXCEPTION—WHEN INSUFFICIENT.—An exception to the ruling of the court refusing to allow a question to be answered presents no question for review on appeal, unless the bill of exceptions discloses what facts were sought to be elicited by the question. (*Kelley v. Highfield*, 14 Pac. Rep. 743, followed.)

EVIDENCE—RECORDED DEED COMPETENT.—The record of a conveyance duly recorded, or a transcript thereof duly certified by the county clerk in whose office the same may have been recorded, may be read in evidence in any court in this State with like force and effect as the original conveyance.

EVIDENCE—OBJECTIONS THERETO.—When evidence is offered, the better practice is for counsel to submit the objections thereto which are relied upon, so that one ruling may dispose of them.

SECTION 3043 OF HILL'S CODE CONSTRUED.—This is a remedial statute, and its provisions must be liberally construed in furtherance of the legislative intent, and its effect was to make unsealed deeds which had been recorded of the same effect and validity as if they had been sealed.

PRESUMPTION OF FRAUD—WHEN DOES NOT ARISE.—If a deed were intended as a deed of trust, and was taken by the plaintiff for that purpose, and was such as would necessarily delay M. S. & Co. in the collection of their claim, the law will not, from these facts alone, presume that such deed was executed with a fraudulent intent. These facts might be weighed with the other facts in the case, but standing alone, they raise no presumption of fraud.

INSTRUCTION—WHEN NEED NOT BE GIVEN.—An instruction which in effect withdraws from the consideration of the jury material facts, and which directs them to base their verdict on certain specified facts, and which instruction ignores other material facts in evidence, ought not to be given.

APPEAL from Douglas County. Affirmed.

W. R. Willis, for Appellants.

J. W. Hamilton, and J. C. Fullerton, for Respondent.

STRAHAN, J.—This is an action of ejectment to recover an equal undivided one eighth of certain real property situated in Douglas County. The complaint is in the usual form in such case. The answer traverses the material allegations of the complaint, except it impliedly admits that during the time stated in the complaint the defendant withheld said premises from the plaintiff. The answer, then, by way of further and separate defense, alleges that Alanson Miller, in his lifetime, owned the real property in controversy; that he died intestate in 1877, leaving seven heirs, including Asa Miller; that defendant had

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succeeded to the interest of Alanson Miller, Jr., who was one of the heirs at law of Alanson, Sr.; that on the twentieth day of March, 1877, Marks, Sideman & Co., in due form, caused Asa Miller's interest in said land to be attached, and thereafter, in due course of law, obtained a judgment against him in the County Court of Douglas County, Oregon, for \$351.50, and \$29.70 costs and disbursements. The answer then alleges the issuance of an execution on said judgment, and the sale of said premises to William J. Freedlander, the confirmation of the sale by the court, and the execution and delivery of a deed to the purchaser.

The deed recites that the sheriff sold all the interest Asa Miller had in said land on the fifth day of July, 1877, instead of the 20th of June, the date of the attachment, and it is alleged that this is a mistake which was not discovered until after the action was commenced. The defendant derails title by mesne conveyances from Freedlander. The answer then alleges in substance that the plaintiff, on or about the twenty-first day of June, with the purpose and intent to overreach, cheat, and defraud Marks, Sideman & Co., and to prevent them from collecting their said claims and judgment which they might recover against the said Asa Miller, procured him, said Asa Miller, and his wife, to execute, acknowledge, and deliver to him a deed purporting to convey to him, said John Stanley, all his interest in his deceased father's estate. It is then stated that said deed bears date June 18, 1877, but that said date is not the true date; that plaintiff caused said deed, and the acknowledgment thereof, to be falsely dated, so that it appears on its face to have preceded the levying of said attachment, when in truth it was executed subsequently thereto; that said Asa Miller at said time had no other property subject to execution; that said deed was and is fraudulent and void, and was intended to hinder, delay, cheat, and defraud the creditors of said Asa Miller, and especially Marks, Sideman & Co., out of their just demand against him.

The reply put the new matter in the answer in issue. The cause was tried before a jury, and resulted in a verdict and judgment in favor of the plaintiff, from which judgment this appeal

is taken. Upon the trial, the defendant took a number of exceptions to the ruling of the court in admitting and excluding evidence, as well as to instructions given and refused. These exceptions, or such of them as we deem of any importance, will now be considered.

1. *Bill of exceptions must show answer expected.* On his cross-examination, appellant's counsel asked the plaintiff John Stanley, who had been sworn as a witness in his own behalf, if he had not, after taking his deed from Miller, acted as agent for William McBee and his mother in procuring deeds from the Liggett heirs to set up against the Miller title to those lands, and if it was not in consequence of a judgment obtained in the Circuit Court against McBee on the litigation of these titles that the sheriff put him off the land; but on objection being made, the witness was not allowed to answer. The defendant then called Robert Phipps as a witness, who testified that he was acquainted with Asa Miller, with Marks, Sideman & Co, and with the plaintiff. The defendant then asked him if he had a conversation with Asa Miller about the middle of June, 1877, in which he (Miller) wanted to transfer to him his interest in his father's estate, and if so, what reason he gave for wanting to make the transfer; and for like reasons this question was not answered. The defendant asked Asa Miller, who was one of his witnesses, this question: "Did not Flood & Co. bring an action against you in the Justice's Court for Deer Creek precinct, shortly after you made this deed to Stanley to collect the amount you were owing them?" The court sustained objections to each of these questions, and the witness did not answer either of said questions, nor does the bill of exception disclose what facts the defendant expected to elicit, or what facts those questions were designed to bring before the jury. We have held that such exceptions present no question for review on appeal. The presumption is that the judgment of the court below is right. To overthrow this legal intendment the appellant must make it appear affirmatively on his appeal that prejudicial error was committed against him on the trial. Such error is not made to appear by asking a question which might possibly or even probably elicit a fact

which tends to support the appellant's contentions; but if such question is not allowed by the court to be answered, the bill of exceptions must disclose what facts the party expected to prove by the witness, so that this court may judge of their relevancy or materiality. (*Kelley v. Highfield*, 14 Pac. Rep. 744.)

2. *Record of a deed competent evidence.* It appears from the bill of exceptions that the plaintiff offered in evidence the record of the deed from Asa Miller and wife to John Stanley, which was objected to as irrelevant, immaterial, and incompetent, and not the best evidence. The court overruled these objections and admitted the record, to which ruling the defendant excepted. This record is not made a part of the bill of exceptions, and is not before us, nor does it anywhere appear of record that this deed as it appeared of record was not executed with all the formalities required by law to entitle it to be recorded. It was the record of the deed from Asa Miller and wife to John Stanley. Such a record is competent evidence. Hill's Code, section 3028, provides that "the record of a conveyance duly recorded, or a transcript thereof duly certified by the county clerk in whose office the same may have been recorded, may be read in evidence in any court in this State, with the like force and effect as the original conveyance." So far as appears from the transcript this record was properly admitted in evidence, and the exceptions to the ruling of the court in admitting it cannot be sustained.

3. *Construing section 3042 of Hill's Code.* The bill of exceptions further shows that the plaintiff offered in evidence the deed from Asa Miller and wife to Stanley. The defendant objected because it was irrelevant, immaterial, and incompetent, which objections were overruled by the court, and said deed was admitted in evidence. The defendant then, before the deed was read or submitted to the jury, moved the court to exclude said deed as evidence, for the reason that it had not been properly executed, in that it was unsealed; but the court overruled this motion, to which an exception was taken. The defendant ought to have made and urged all the objections he had to this deed at the time it was offered. It is a loose and irregular practice for counsel, when a paper is offered in evidence, to submit certain objections to its introduction,

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and upon those objections being overruled and the paper ordered to be admitted, to proceed to state other objections. All objections which counsel intend to rely upon ought to be submitted at one time so that one ruling may dispose of them. But for the purposes of this case, assuming that these objections were all in time, and we will so treat them, the court did not err in overruling them.

In reaching this conclusion we do not consider or decide whether the deed was properly sealed or not, or what would be the effect of the record of the deed which was offered without the introduction of the original deed, but place the case entirely on the curative statute of 1878. The provision is in Hill's Code, section 3042, and is as follows: "All deeds to real property heretofore executed in this State, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment whatever; and such deeds so executed shall be received in evidence in all courts in this State, and be conclusive evidence of the title of the lands therein described against the grantors, their heirs and assigns. "The occasion for the enactment of this statute is well known. It is a part of the legislative and judicial history of the State. Previous to its enactment many deeds had been executed in this State covering large amounts of valuable property, but which by some oversight or neglect, some technical formality required by law had been omitted. Such omission in no manner affected the good faith of the parties or the real rights which were designed to be created or transferred by such deeds; but as property increased in value, designing persons entered into the business of searching the records for defective titles, and then causing a second deed to be made for the same property to some person in collusion with them, and instituting an action to recover the property. This enactment was designed to defeat such nefarious practices, and to confirm to the persons who had purchased the property and paid for it the full legal title, and which they had not received by reason of some slight defect or informality in their deeds. Such a statute

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is, in the fullest sense, a remedial statute, and its purposes and objects are to be liberally construed and applied for the purpose of giving full effect to the legislative intent, and accomplishing the beneficent purposes of the enactment.

There is nothing in the Constitution of this State prohibiting the passage of retrospective laws in such cases, and where not prohibited, the power of the legislature to pass them has been generally sustained. The formalities required in the execution of a deed are purely statutory, and it is always competent for the legislature to declare by what form of conveyance the title to real property may be transferred. The rule as to curative statutes in such cases seems to be this: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the legislature might have dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by a subsequent statute. And if the irregularity consists in doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." (Cooley on Constitutional Limitation, 371.) Such legislation is sustained by numerous authorities. (*State v. City of Newark*, 3 Dutch. 185; *Foster v. Essex Bank*, 16 Mass. 244; *Gashorn v. Purcell*, 11 Ohio St. 641; *Matter of Sticknoth*, 7 Nev. 223; *Dentzel v. Waldie*, 30 Cal. 138; *Carpenter v. Pennsylvania*, 17 How. 456; *Barrett v. Barrett*, 15 Serg. & R. 72; *Lessee of Dulany v. Dangerfield*, 6 Gill & J. 461; *Mazay v. Wise*, 25 Ind. 1; *Watson v. Mercer*, 8 Peters, 88; *Boyce v. Sinclair*, 3 Bush, 261; *Bleakney v. Farmers' and Mechanics' Bank*, 17 Serg. & R. 63; *The Syracuse City Bank v. Davis*, 16 Barb. 183; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *Trustees of Cuyahoga Real Estate Association v. McCaughy*, 2 Ohio St. 152; *Andrews v. Russell*, 7 Blackf. 473; *Inhabitants of Goshen v. Inhabitants of Stonington*, 4 Conn. 209; *Bank v. Allen*, 28 Conn. 98.)

4. But it is further claimed by counsel for the appellant that if it were competent for the legislature by the act under consideration to give validity to deeds which, without this enactment,

would have been invalid, still the operation of the curative act must be confined to the immediate parties to the deed, and could not be extended to other persons who might before the passage of the act acquire an interest in the subject-matter of the controversy. The statute on its face assumes to make such deed valid and "conclusive evidence of the title to the lands described therein, against the grantors, their heirs and assigns." Whether this statute would be held operative against a *bona fide* purchaser for value and without any notice of the first vendee's right, it is not now necessary to decide, but I am strongly inclined to think it would not; but that question was not made in the court below. The pleadings are silent on this point; nor were any instructions refused or given by the court on this subject to which an exception was taken. And under any view we are inclined to take of the subject, unless the defendant is such *bona fide* purchaser, he stands in Miller's shoes, and is concluded by whatever would have bound or affected Miller. It follows from these considerations that the court did not err in receiving said deed in evidence, and in refusing to exclude it from the jury after it had been admitted.

5. *A deed per se raises no presumption of fraudulent intent.* The appellant asked the court to give the jury the following instruction: "If the deed of Miller and wife to the plaintiff was intended as a deed of trust, and taken by the plaintiff for that purpose, and the transfer was such as would necessarily delay Marks, Sideman & Co. in the collection of their claim, the law will presume that it was done with a fraudulent intent." This instruction was properly refused. In the trial of an action of ejectment, the legal title must prevail over a mere equity; and unless this deed could be overthrown on the ground of fraud, it must be held operative. The effect of every conveyance of property by one indebted may be to delay some creditor in the collection of his debt, but such conveyance is not on that account *per se* fraudulent; nor will the law adjudge such a transaction fraudulent for that reason alone. It may be a circumstance to be weighed and considered with all the other facts in the case, but standing by itself, it raises no such presumption.

6. *Jury should consider all the evidence offered.* The appellant also asked the court to give the jury this instruction: "The fact that the note offered in evidence by the plaintiff being found in his possession, with the assignment of Flood & Co. to him indorsed upon it, raises a satisfactory presumption that it is still his property, and has not been paid to Miller on the purchase-price of the land." This instruction was refused. The plaintiff had testified in effect that when he purchased the land in controversy of Miller, he was to pay this note to Flood & Co. as a part of the consideration for the land, and that he subsequently paid the note to Flood & Co., and received the same, with their indorsement thereon. The instruction asked in effect withdrew all of these facts from the consideration of the jury, and directed them to find on the isolated facts as to the indorsement and possession of the note. This was not proper. The jury had the right, and it was their duty to consider all the facts submitted to them on this subject, and an instruction, the effect of which was to withdraw any portion of the facts from them, or directing them to find as to the effect of particular facts, ignoring others bearing on the same subject and equally important, would have been highly improper. The same remarks are applicable to the third instruction asked by the appellant, which was refused.

7. The fourth instruction which was asked by the appellant, defining what constituted a seal, and the effect of an unsealed deed, was refused, and the view we have taken of the confirmatory statute renders this instruction improper. That statute rendered the deed operative without a seal. In other words, as to all deeds theretofore signed by the grantors, a seal was declared to be unnecessary.

8. The only important issue of fact made by the pleadings in the view we have taken, was whether or not Miller's deed to the plaintiff was in fact executed after Marks, Sideman & Co. caused said property to be attached. The answer alleges that it was so antedated, and this issue seems to have been fully submitted to the jury and fairly tried, and the jury, in effect, found that it had not; but that it was executed on the day of its date. This dis-

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posed of the only defense which appears to have been seriously relied upon in the court below.

Let the judgment be affirmed.

LORD, C. J., did not sit at the hearing of this case, and took no part in its decision.

[Filed December 19, 1887.]

D. W. APPELLEGE, APPELLANT, v. B. F. DOWELL,
RESPONDENT.

DECREE—OWNER OF LAND, WHEN NOT AFFECTED BY.—In a suit to quiet title, the plaintiff showed possession for the time limited by law for the commencement of actions to recover real estate, and also a regular deed thereto. *Held*, that a decree rendered against his grantor, subsequent to his purchase of the land, declaring the said grantor's deed fraudulent, where there was no issue upon the point in the suit in which the decree was rendered, did not estop the plaintiff from claiming title to the land.

UNITED STATES COURT—JURISDICTION OF.—United States courts in equity and common-law cases are courts of *limited* although *not inferior* jurisdiction, and some especial grounds of jurisdiction must be shown to enable them to take cognizance of causes, and the facts set out as the ground of jurisdiction will be presumed to be the only source from which such jurisdiction is derived.

SAME.—Consent of parties does not invest the court with jurisdiction. The law must confer it, or it does not exist in the court.

SAME.—In a suit between citizens of the same State to set aside a deed as fraudulent, and subject land in the State to a judgment of the State courts, an allegation of fraud upon the revenue laws of the United States does not show a cause cognizable in the federal courts under the laws of the United States.

DEGREE OF COLLATERAL ATTACK UPON.—The courts of the United States being courts of superior jurisdiction, their decrees are not open to collateral attack, unless it is affirmatively shown by the record that they had no jurisdiction.

APPEAL from Douglas County. Reversed.

Williams & Williams, for Appellant.

J. F. Watson, for Respondent.

THAYER, J.—This appeal comes here from a decree of the Circuit Court for the county of Douglas. The appellant commenced a suit in that court to remove a cloud from his title to 40 acres of land, which he alleged in his complaint that he is

15	513
17	300
16*	661
20*	429

15	513
24	440
16*	661
33*	937

15	513
41	832
15	513
43	472

15	513
44	314
15	513
45	581

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the owner of in fee-simple, and in possession of. The land was a part of the donation land claim of Jesse Applegate in said county of Douglas. The respondent denied in the answer the appellant's ownership of the land, and claimed ownership thereof in himself, under a decree recovered by him against the said Jesse Applegate, the appellant, and others, on or about the fifth day of January, 1883, in a suit in the United States Circuit Court for the district of Oregon, and a deed executed to him in pursuance of such decree by the master of chancery of said court, alleging that said land was included in a certain tract of land, consisting of 121.55 acres, which was found in said suit by said United States court to belong to the said Jesse Applegate, and subject to the payment of a certain judgment in favor of the respondent and against said Jesse Applegate. The appellant filed a reply to the respondent's answer, in which he denied that the title to said 40-acre tract, or any part of it, was in issue in the suit in said United States Court; denied that said last-mentioned court had any jurisdiction in said suit to render such decree, or that said master in chancery had any power to sell said land. Upon the hearing of the case in the court below the appellant, to maintain his cause, gave in evidence a deed to said 40-acre tract, executed to him by William H. H. Applegate and wife on the eighth day of October, 1874, which purported to convey to him said last-named tract. The deed was duly executed and acknowledged so as to entitle it to record, and was duly recorded in the office of the clerk of the county of Douglas, on the thirty-first day of October, 1874, in the record of deeds in said office. And it appears to have been conceded on the part of the respondent that at the time of its execution the said William H. H. Applegate held a deed from said Jesse Applegate to certain lands, which included said 40 acres, and that the same was a part of said Jesse Applegate's donation claim before referred to.

The respondent, to sustain the issues on his part, gave in evidence a duly certified copy of an amended and supplemental bill, filed in said United States Court in said suit on the twelfth day of September, 1881, in which the respondent was complainant,

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and the said Jesse Applegate, William H. H. Applegate, the appellant, and others were defendants; also of an answer to said bill filed in said suit by the appellant; and also of the decree of the court therein, and of the deed executed to him by said master in chancery. Said deed bears date December 6, 1883. The appellant's counsel objected to the admission of said evidence upon the grounds of irrelevancy and immateriality, which objection the court overruled, and the appellant's counsel excepted to the ruling.

The main issue between the parties is the ownership of the 40 acres of land in suit. The appellant, I would infer, was in possession of the land at the time the suit was commenced, as his allegation of possession is not denied in the respondent's answer; and it was admitted at the hearing that he paid full value for it upon the purchase thereof referred to. The Circuit Court failed to make any findings of facts and law as required by section 393 of the Civil Code, as amended in 1885, and the counsel on either side have presented only a cursory view of the matter, and the briefs they have submitted contain but a meager statement of it. The court is left, therefore, to search through the various documents referred to in order to find out what is in the case.

The bill filed in the suit in the United States court states substantially that the respondent and the said Jesse Applegate became co-sureties to the State of Oregon in 1862, and also in 1866, upon the official bond of Samuel E. May as secretary of State, who was elected to said office for two successive terms in said years; that May became a defaulter upon the bonds, and judgments were recovered in favor of the State and against the sureties upon each of them some time in 1874; that one of said judgments was for \$8,929.85, besides costs and disbursements, and a transcript thereof was filed and the judgment was docketed in the office of the clerk of the county of Douglas on the eleventh day of August, 1874; that prior to the twenty-seventh day of June, 1878, the respondent paid on said last-mentioned judgment \$10,837.75, and on said day recovered a judgment against said Jesse Applegate as his co-surety on said payments

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for the sum of \$4,882.19, which was on the same day entered on the judgment-lien docket of said county of Douglas; that respondent, on the sixteenth day of November, 1878, paid on the said judgment \$1,385.61, the balance due thereon, and gave due notice that he claimed the benefit of it against said Applegate, and became subrogated to the rights of the State in reference thereto, upon which he caused an execution to be issued, and collected the larger part thereof; that the amount of his claim against said Applegate, arising out of said affairs, was, on the first day of January, 1881, \$6,584.09; that said Jesse Applegate, in 1849, took the said donation land claim under the Donation Act of September 27, 1850, which is claim No. 38, notification No. 54, certificate No. 103, T. 22 S., R. 5 W., W. M., and contains 642 acres; that he perfected title thereto, the north half to himself, and the south half to his wife, Cynthia Ann Applegate. He also acquired other lands situated in said county of Douglas, and which are described in the said bill. That said Applegate and wife, with intent to delay, cheat, and defraud the State of Oregon and the respondent out of said debts, deeded all of said lands to their children as follows: To said William H. H. Applegate, their son, 160 acres of the north half of said donation land claim, by deed dated the sixth day of April, 1867, for the apparent consideration of \$500; also 80 acres of said donation land claim, by deed dated the nineteenth day of April, 1869, for the apparent consideration of one dollar, which deeds were recorded in the office of the clerk of said county, the first one, the sixth day of February, 1869, and the second one, the fourth day of May, 1869. To the appellant, their son, 160 acres of the Jesse Applegate part of said donation land claim, by deed dated April 6, 1867, for the apparent consideration of \$500, which deed was recorded in said last-mentioned office the sixth day of February, 1869; also 80 acres of said donation land claim, for the apparent consideration of one dollar, which was recorded in said office May 5, 1869. To Charles Putman, a grandson of Jesse Applegate and wife, a tract of land outside of the donation claim. To Peter Applegate, their son, 211.31 acres of land, 170 acres of which was a

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part of the said "donation land claim; also to Sallie Applegate another tract of land outside of the donation land claim.

The bill charges that said deeds were illegally recorded; that each and all of the grantees received them with the intent before mentioned; that each and all of them had notice that said Jesse Applegate was largely indebted to the State of Oregon as the security of May on said bond at the time each deed was made and delivered, and that they well knew that the deeds would make the grantor, Jesse Applegate, insolvent; that the deeds to William H. H. Applegate and to appellant, dated 1867, were antedated, for the purpose to deceive, cheat, etc.; that the pretended money consideration in each was inadequate, and that neither of the grantees paid any money for the land described in said deeds. It is also alleged in said bill that on the seventeenth day of September, 1879, an execution was issued on respondent's judgment against Jesse Applegate to the sheriff of Jackson County, and that it was since returned unsatisfied; and that on the seventh day of October, 1879, an execution thereon was duly issued to the sheriff of Douglas County, and had been since returned unsatisfied; also that on the twenty-fourth day of June, 1871, the said William H. H. Applegate deeded 200 acres of the north half of said donation land claim to Charles and John C. Drain, for the sum of \$2,000, cash, and that this deed was also illegal, fraudulent, and void; that the actual price paid was \$2,000, yet the deed, to conceal the value of the land and to cheat and defraud the creditors, etc., expressed on its face the consideration of \$500 only, and in place of having a revenue stamp of two dollars, as was required by the act of Congress at the date of said deed, only had a revenue stamp of fifty cents; "that each and all of said deeds to William H. H. Applegate, to the appellant, and to the other grantees before mentioned, were illegal, and a fraud under the statutes of the United States, entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved thirtieth day of June, 1864, and the amendments thereto; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees, with the intent of evading the provisions of

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said statute; that the grantors and grantees well knew that the land conveyed by each deed was at the date thereof worth in cash more than \$10,000, and each of them have a revenue stamp on them of fifty cents and no more, not one half the amount required by said act of Congress; and the recording of each of them was in violation of the spirit meaning of sections 152, 156, and 158 of said statute; that none of said stamps have been canceled by writing the date when the deed was so used or stamps affixed on the same, and that none of them have the initials of the person using them or affixing the same prior to the placing said deeds on the records of Douglas County, in the State of Oregon."

The allegation in reference to affixing the revenue stamps upon the deeds, their inadequacy, and the neglect to cancel them before the recording of the deeds, were evidently made in order to give the United States court jurisdiction of the suit. The bill in fact shows upon its face that said court would have had no jurisdiction of it in the absence of such allegations, as it contains in the outset an express statement that all the parties to the suit were citizens of the State of Oregon. Whether such allegations made such a case as would entitle the United States court to assume jurisdiction of the subject-matter involved in said suit will be referred to hereafter. The foregoing facts are the main features of the amended bill. The supplemental bill merely sets forth some changes that occurred in regard to the affairs of the parties after the filing of the amended bill, which need not be considered.

I find nothing material to this case in the appellant's answer to said bill; it purports to be his separate answer thereto, and the statement to that effect is in the usual form laid down in equity precedents. Many of the matters stated in the bill are admitted in the answer. The appellant denied the fraudulent intent charged in the bill against Jesse Applegate and wife in making the deeds referred to therein, or in deeding to appellant the 160 acres of land by the deed of the 6th of April, 1867; denied that said deed conveyed, or purported to convey, any part of Jesse Applegate's half of said donation land claim, or

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that the consideration therein named was an apparent consideration; but alleged that the whole of said land conveyed by both of the deeds from Jesse Applegate and wife to him was in the southeast part of the wife's half, except a small piece which lay south of said claim, and that said deeds were made and delivered to him for a good, valuable, and sufficient consideration, which is specified in the answer. And the appellant denied all the fraud charged against him in the said bill, or relating to his receiving and recording the deeds executed to him, or their effect upon the solvency of said Jesse Applegate, or that he was insolvent in consequence of the making and delivery of said deeds, or that the deeds were illegal or fraudulent, or a fraud under the statutes of the United States, or any statute relating to the the internal revenue, and all the matters connected therewith charged in the bill; and averred that the deeds were executed to him, and that he received them in good faith. It will be seen from an inspection of the said decree that the said United States court adjudged that Jesse Applegate became indebted to the respondent in the manner and to the extent substantially as alleged in the bill; that the latter thereby acquired a lien to the amount of such indebtedness upon all the real property of said Jesse Applegate situate in said county of Douglas, from and since the entry and docketing of the judgments mentioned and set forth in said bill; also that on and prior to April 19th, 1869, said Jesse Applegate was the owner in fee-simple of 121.55 acres of the north one half of said donation land claim, the said 121.55 acres being, as stated in said decree, the whole of said north half of said claim, except the portion, 200 acres, more or less, conveyed by William H. H. Applegate on June 24th, 1871, to Charles and John C Drain. That it was adjudged therein that the conveyance of said 121.55 acres by Jesse Applegate to his sons, William H. H. Applegate and Daniel W. Applegate, by deeds dated April 19 and 20, 1869, respectively, was voluntary and without a valuable consideration, and in fraud of the rights of the respondent, and was, therefore, as against him and his assigns, declared to be null and void; that it was also adjudged in the said decree, that the several

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conveyances to Peter Applegate, and to the daughter, Sallie Applegate, stood in the same condition, and were also held to be null and void to the same extent; and that it was decreed therein that unless said Jesse Applegate, Daniel W., William H. H., Peter, and Sallie Applegate pay the amount of the indebtedness to the respondent, with costs, etc., within twenty days from the entry of the decree, that the master of the court was authorized and required to sell as upon execution all the interest of said Jesse Applegate on January 1, 1869, in certain pieces of land, viz., the 121.55 acres of the north half of said donation land claim, and all the south half of said claim except the 140 acres, more or less, conveyed, the decree states, by Jesse Applegate to said Daniel W. Applegate, and the portions deeded to said Peter and Sallie Applegate. And that it was further adjudged and decreed therein and thereby, that the conveyance by Jesse Applegate to William H. H. Applegate, on April 6, 1867, of 160 acres, more or less, in the north half of said donation claim, and the conveyance by him to his son, Daniel W. Applegate, appellant herein, of the same date, of 146 acres, more or less, in the south half of said claim, were made in good faith, etc. It will also be observed by an inspection of the said deed from the master to the respondent that the provision of the decree, authorizing and directing him to make the sale of the said interest of Jesse Applegate, was executed.

From these various facts we have to determine the status of the title to the 40 acres of land in dispute. The suit herein was commenced on the seventeenth day of August, 1886, and when the appellant introduced his deed from said William H. H. Applegate in evidence at the hearing, he made out under the issues in the suit a *prima facie* case. At that stage of the proceeding he was presumably entitled to the relief claimed. He was in possession of the land under an absolute deed of title, which had been executed to him and recorded in the office of the clerk of the county in which the land is situated more than eleven years; and the respondent was claiming it adversely to him. In order to defeat such recovery, it devolved upon the respondent to prove that appellant had acquired no title to the

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land, or that he had aliened it, or, in some legal manner, had been divested of it. And for that purpose the respondent introduced in evidence the said decree of the said United States court, and other proceedings connected therewith. Whether that evidence was effectual for the purpose depends upon the two questions already alluded to, viz.: *First*, whether the said decree operated upon or affected the appellant's title derived under the deed from William H. H. Applegate of October 8, 1874; and *second*, whether the said United States court had jurisdiction of the suit in which the said decree was rendered.

It is very difficult to determine from the *data* before us when or how Jesse Applegate disposed of, or attempted to dispose of, the 40 acres of land in question. It is alleged in said bill that he and his wife deeded to said William H. H. Applegate 160 acres of the north half of the said donation claim, by deed dated April 6, 1867; also 80 acres of said donation claim, by deed dated April 19, 1869. These two parcels constitute all the land shown by the said bill to have been conveyed to said William H. H. Applegate. It is not stated in the bill in which half of the claim the said 80 acres are situated, but as said William H. H. Applegate deeded 200 acres in the north half of the claim to the Drains, and the 40 acres, also in said half of the claim, to the appellant, which correspond in acreage to the 160-acre parcel and the 80-acre parcel, it is evident that the latter parcel is situated in said north half also, and that the said 40 acres must have been deeded by Jesse Applegate and wife to William H. H. Applegate by one of the said deeds referred to. Nor is this view inconsistent with the inferential statement in the decree, that Jesse Applegate conveyed said 121.55 acres to his sons, William H. H. Applegate and Daniel W. Applegate, by deed dated April 19 and 20, 1869. It will not be presumed that Daniel W. Applegate purchased of William H. H. Applegate, land, and paid him the full value therefor, which he already had a deed to from the latter's grantor. The decree, then, only operated upon the conveyance from Jesse Applegate to William H. H. Applegate long after the latter had conveyed the land to the appellant, and whether that affected the title in the appel-

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lant's hands is the question for determination. The deed to William H. H. Applegate was not void, conceding it to have been a conveyance made with intent to hinder, delay, or defraud creditors, although the statute declares that such conveyances shall be void. It was good as between the parties, and as to every one except creditors, and they can only treat it as void in a proceeding to collect their debts. A sale of the property to a *bona fide* purchaser for value will cut off their claim and pass a good title. (Wait on Fraudulent Conveyances and Creditors' Bills, §§ 409, n. 1, 445.)

It was claimed on the argument by the respondent's counsel that it was the duty of the appellant to have interposed a plea in the suit in the United States court that he was such a purchaser, if he claims to have been such, and that his failure to do so estops him from setting up any claim of title to the land. The suit in the United States court was in the nature of a creditor's bill. Its object was to subject certain property Jesse Applegate had conveyed to his children to the payment of a debt he was owing to the respondent. It was to ascertain the intent of said Applegate in making the conveyances, and if found to be fraudulent, to direct a sale of the property and application of the proceeds to the payment of the debt. The conveyances were to the several parties, and were separate transactions in the main, though probably not to such an extent as to require separate suits to be brought against each. The bill under the rule laid down in *Fellows v. Fellows*, 4 Cowen, 682, may not have been objectionable upon the ground of multifariousness, and yet the appellant was not required to answer any matter charged against any of the other defendants in the suit, and there was no charge against him regarding the purchase of the said 40 acres of land. The said Jesse Applegate was charged in the bill with having conveyed it, with other lands, to said William H. H. Applegate, with intent to delay, etc., his creditors, and the latter was charged with having accepted the conveyance under circumstances that might cast suspicion upon his good faith in the affair.

The difficulty in the case arises from the fact that the complainant in the bill treated the land as being held by said Wil-

liam H. H. Applegate, under a deed from said Jesse Applegate, and only sought to have that deed annulled; when in fact the former had long prior thereto conveyed the land for an adequate consideration to appellant, by a deed that at the time of the filing of the bill had been standing upon the records of Douglas County for nearly seven years; and the appellant was probably in possession of the land at that time. Was the latter, then, bound by the decree? He might have been, possibly, if the conveyance to him had been a secret one, and he would not, unquestionably, if he had not been made a party to the suit. But was he a party to the suit for the purpose of affecting the transaction of his purchasing the land from his brother in 1874? All the defendants in the bill were made parties in order to prevent a multiplicity of suits. As between them, respectively, and the complainant, except as to some common matter, if there were any such, the suit might be regarded, it seems to me, the same as though it had been brought against them separately. The complainant could have had the sale from William H. H. Applegate to the appellant inquired into, the same as he did the sale from the former to the Drains. He could have charged the parties with bad faith in the affair, and if it had been sustained, have been relieved from its effect; but he did not seek to do that. He contented himself with impeaching the deed from Jesse Applegate to William H. H. Applegate, and left the other in *statu quo*. It was his duty to ascertain whether or not William H. H. Applegate had conveyed away the land, and if so, have had the transaction inquired into, if he desired to question it; as the appellant's counsel very pithily expresses it in his brief, "it was Dowell's business to see that the holder of the legal title was sued, and not the business of the holder of the legal title to see that Dowell sued the proper person."

The decree itself only binds the parties to the suit, and concludes them no further than the issue determined therein. It does not bind them as to matters which were not in issue in the case. If the validity of the said deed from William H. H. Applegate to appellant had been made an issue in the suit, the decree would have been conclusive upon the question; but it

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would had to have been directly in issue, and not merely collaterally litigated. "It must be a fact immediately found according to the pleadings, not that on which the verdict was merely based, *a fact in issue as distinct from a fact in controversy.*" (*Glenn v. Savage*, 14 Or. 573.)

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties, upon a different claim or cause of action, is often overlooked. And it is from that circumstance that attorneys and courts have frequently been misled by the rule laid down in *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, to the effect that the judgment of a court of competent jurisdiction is not only conclusive as to all questions actually decided; but as to all which the parties might have litigated and had decided therein. Judge Field in *Cromwell v. County of Sacramento*, 94 U. S. 351, has pointed out the distinctions referred to, with his accustomed clearness and accuracy. It amounts simply to this, that if the second action is upon the same claim, the former judgment, if upon the merits, will constitute a complete bar, not only as to every matter that was brought in to defeat the claim in the former action, but as to every other matter that would have been admissible for that purpose. If, however, the second action is upon a different claim, the former judgment will only operate as an estoppel against the matters actually litigated therein. In that case it concludes only those facts that were directly in issue in that action. The inquiry in the latter case, Judge Fields says, "must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined; only upon such matters is the judgment conclusive in another action." The case here clearly belongs to the latter class, and the decree in the United States court, conceding its validity, does not conclude the appellant from asserting title to the 40 acres of land in controversy.

The view we have taken of the first one of the questions before mentioned renders it unnecessary to consider the second. But

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the matter is of too much public interest, I think, to be passed over without observation. Parties to a litigation in this State have often been desirous of having it adjudicated upon in the federal courts. A preference in favor of those tribunals on account of the learning and ability of the judges who preside over them is very proper. It must, however, be borne in mind that the jurisdiction of the United States courts in equity and common-law cases is limited, although they are not inferior courts. That it is necessary to show in the outset, when a case of that character is sought to be commenced therein, some especial grounds of jurisdiction over it before they are authorized to assume the right to decide the matter submitted, and that the facts set out as the ground of jurisdiction will be presumed to be the only source from which it is derived. When, therefore, the facts upon which it is claimed are not sufficient to confer jurisdiction, it cannot attach; nor will it matter if the parties, as they often do, consent to the courts exercising it under such circumstances. Consent will not confer jurisdiction over the subject-matter in any case. The law must give it, otherwise it cannot be acquired. Nor will the decision of the court that it has jurisdiction avail where facts are required to be shown as a condition of its exercise, unless they legally tend to establish a case conferring it. No court can obtain jurisdiction by arbitrarily deciding that it has it. I am induced to make these suggestions, for the reason that it is a very unpleasant and extremely delicate duty to be required to pass upon the authority of another court to adjudicate an important matter. And there should never be occasion for it where it can possibly be avoided.

The only grounds, as before observed, upon which it can be claimed that the Circuit Court of the United States for the district of Oregon had jurisdiction of the suit of *Dowell v. Applegate*, in which the said decree was given, were the allegations in reference to the insufficiency of the revenue stamps upon the deeds, executed by Jesse Applegate and wife to their children, and by William H. H. Applegate to Charles and John C. Drain. The bill filed therein stated expressly that all the parties were citizens of the State of Oregon. The proceeding was to enforce

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the payment of the judgments recovered in the State courts of the State of Oregon, growing out of a defalcation of one of its State officers. It was a suit to reach property that the plaintiff, in one of the judgments, and who had been subrogated to the rights of the plaintiff in the other, had been unable to reach by the ordinary process of execution issued out of the State court. The jurisdiction of the said United States court was invoked as auxiliary to the process of the State courts, and the federal question involved in the case, if it deserves to be considered as such, was not regarded of sufficient importance to receive from the court in the opinions delivered more than a passing remark, and was evidently thrown into it as a mere subterfuge upon which to claim the benefit of federal jurisdiction.

It is to be seriously regretted that the decree of a court of so high standing, in a suit of such magnitude and importance, that was tried with ability, and decided with great care and painstaking, should hang upon so slender a thread for its authority. The complainant in the suit was anxious no doubt to have it tried in the federal court, and it is more than probable that the defendants therein willingly consented to it. Parties may agree to an arbitration of their differences, but they cannot clothe a court with power to hear and determine a case. The law must invest that authority. The Constitution of the United States delegates to it certain judicial power. It extends to all cases, in law and in equity, arising under the Constitution, the laws of the United States, and treaties made under their authority, to controversies between citizens of different States, and to a few other cases, which need not be mentioned. The United States court must have acquired jurisdiction over the suit referred to, under an act of Congress adopted to carry out the two provisions of the Constitution above set out; and the extent of authority of such act must be measured by the power delegated by the said provisions. The former may be co-extensive with the latter, but cannot exceed it. Of course it will not be claimed that the controversy was between citizens of different States, in view of the statement referred to in the bill. It must have been a case "arising under the laws of the United States." And how could it be regarded

as such a case when the right of Dowell to a recovery in the suit did not depend upon any such law. Judge Deady, in *Dowell v. Griswold*, 5 Sawy. 43, very properly observes, that "a case does not arise under such a law within the scope of that jurisdiction, unless the very right of the party springs out of, or has its origin in such law." And this is but a reiteration in effect of the language of that profound jurist, Chief Justice Marshall, whose decisions long ago established the land-marks in the law of construction of the jurisdiction of the federal courts, under the Constitution of the United States. In *Cohens v. Virginia*, 6 Wheat. 379, he said that a case "may truly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends upon the construction of either." And in *Osborne v. Bank of the United States*, 9 Wheat. 882, said inferentially, that it would be a sufficient foundation for jurisdiction, "that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

How Dowell's right to have the deeds referred to set aside, and the land conveyed thereby sold, and the proceeds applied in payment of the two judgments, was affected by any construction of any act of Congress, might be explained by metaphysical subtleties, but no ordinary logic can demonstrate it. What difference could it have made to him whether the revenue stamps upon the deeds were sufficient or not, or any revenue stamps were on them at all. It did not enlarge his rights by not being there, or lessen them by being there, nor *vice versa*. If their not being on would have rendered the deeds void, that would not have authorized Dowell to sequester the lands, nor their being on, and canceled with due formality, have prevented him from obtaining the relief sought. No deformity of the deeds could affect the merits of the controversy between Dowell and the Applegates. The gravamen of the suit was the alleged fraudulent transfer of the lands, and consequent effect upon Dowell's rights; and the allegation of fraud upon the revenue laws of the United States, by not affixing sufficient stamps upon the deeds, was a flimsy pretext for bringing the suit in the

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United States court, or for transferring it to that court from the State court. It would have been more honest to have brought it there, or have transferred it there as a matter of course, and just as legitimate. It was a fraud upon a law adopted as a part of the system of our government, and such practices should be discountenanced.

As I view the matter personally, the said decree of the United States court has not a prop of inherent support upon which to stand; that, in fact, it was *coram non judice*. Such decrees, however, possess an immunity from collateral attack, which public policy requires to be maintained. The court that rendered it, although a creature of statute, having only defined powers, stands upon the footing of a court of superior jurisdiction; and if the record were silent as to its having acquired jurisdiction in the case, it would readily be presumed that it had jurisdiction. When jurisdiction is assumed by a court of superior jurisdiction, it will be presumed, in a collateral proceeding, that it exercised it rightfully. Nor can such presumption be overcome by proof *de hors* the record. The only mode in which its jurisdiction can be questioned in such a case is by appeal or writ of error. But the difficulty here is that the record is not silent as to the existence of the conditions necessary to confer jurisdiction upon the court; it speaks; says the parties were all citizens of the State of Oregon, and that the subject-matter of the suit was an affair purely of local concern. It shows some facts, it is true, from which it might be inferred that the United States was defrauded of revenue, and which are connected with the transactions complained of, but they evidently had no bearing on the case—could not possibly affect the merits of it. I feel that the decree ought to be sustained if it can be consistently with the principles of law, but it certainly has a shaky foundation upon which to stand. It is an unfortunate circumstance, as I regard it, that the United States court attempted to take jurisdiction of the case. It is highly important that the line of demarkation between State and federal jurisdiction be strictly observed. A stride across the boundary, from either side, necessarily must result perniciously, and prudence

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dictates that it is far better to yield disputed ground, than occasion a collision.

Whether the said decree is vulnerable to collateral attack or not, we do not, for the reasons before suggested, undertake to decide, but under the view taken of the first of the two questions before mentioned, the decree appealed from herein must be reversed, and I suppose under said Act of 1885 the case will have to be remanded for a new trial. The act will bear that construction, and was evidently intended to place suits in equity when tried by the court upon the same footing of actions at law, and subject them to the same rules of practice.

[Filed January 2, 1888.]

G. W. KEZARTEE, RESPONDENT, v. MARKS & CO.
ET AL., APPELLANTS.

NOTICE—CLAIM OF LIEN FOR LABOR OR MATERIALS USED IN BUILDING.—It is not necessary that such claim should on its face state that the amount specified therein "is due over and above all just credits and offsets." (*Whittier v. Blakesley*, 18 Or. 546, approved and followed.)

NOTICE OF CLAIM—WHEN SUFFICIENT.—A notice of a claim filed with the county clerk sufficiently gives the name of the owner of the building, which says that the materials were actually used in repairing the said dwelling-house and fence under the directions of W. F. O., who "was legally in possession of said premises under a contract of purchase and bond for a deed from S. M. & Co." So "building owned by W. F. O., deceased." "Further, furnished the materials upon said house at the request of W. F. O., the owner thereof." So when the notice recited that "the building was owned by W. F. O., and that the work was performed on said building at the request of W. F. O., the owner thereof."

NOTICE—NAME OF OWNER OF LAND.—To affect the land with the lien the name of the owner thereof must be given in the notice. This requirement is one of substance, and it cannot be dispensed with.

NOTICE—WHEN TITLE TO THE HOUSE OR STRUCTURE AND TITLE TO LAND IN DIFFERENT PERSONS.—When the title to the house or structure and title to the land are in different persons, and the notice specifies the name of the owner of the building or structure, but not the name of the owner of the land, the lien may attach to such building, but not to the land.

DESCRIPTION OF BUILDING OR IMPROVEMENT WHERE TITLE TO LAND IN ANOTHER.—When it affirmatively appears that the land where the building was erected did not belong to the person who caused such building or other improvement to be erected or repaired, the lien could only extend to the building or other improvement, and it would not be defeated by failing to describe the land, if such building or other improvement were sufficiently described for the purposes of identification.

15	529
19	190
16*	407
23*	902

15	529
23	150
23	154
23	594
24	46
16*	407
31*	287
31*	288
32*	621
32*	761

15	529
25	432
16*	407
36*	161

15	529
26	115
16*	407
37*	68

15	529
27	276
28	164
39	445

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DESCRIPTION OF BUILDING—WHEN SUFFICIENT.—If there be enough in the description of the locality and other peculiarities of the building to identify it—to point it out with reasonable certainty—with certainty to a common intent, the statutory requisition is complied with.

VERIFICATION OF CLAIMS—WHAT SUFFICIENT.—The statute requires “claims” to be verified, but prescribes no form of verification. *Held*, that a claim signed by the party and verified by his oath was sufficient.

LIEN ON DIFFERENT BUILDINGS OR STRUCTURES.—The liens under the statute are specific; they extend to the particular building, structure, or erection where the materials were used or labor performed. *Held*, therefore, that a party could not unite in the same claim items for materials used in building a fence, and also for materials used in building or repairing a house, and claim a lien on the fence and house for such materials. The fence and house are separate structures or erections, and the liens claimed must be for the materials used in each respectively. (*The Dalles L. & Manuf. Co. v. The Wasco Manuf. Co.* 3 Or. 527, approved and followed.)

APPEAL from Douglas County. **Affirmed.**

J. C. Fullerton, for Appellants.

J. W. Hamilton, for Respondent.

STRAHAN, J.—This is a suit brought by the respondent to enforce three liens for materials alleged to have been furnished in the erection of a dwelling-house situated on the donation land claim No. 53, of John Leiser, about one and one half miles west of Roseburg; and one of said claims also includes materials used in building a fence. It appears from the complaint that at the time the materials were furnished and the liens filed, Marks & Co. owned the land where the house was erected, and that the same was in the possession of W. F. Owens, and that the work was performed and materials furnished under a contract with W. F. Owens; that on the twenty-fifth day of September, 1886, said W. F. Owens died, and that the defendant Johnson is his administrator, and that the claims in the names of S. Hamilton and L. C. Beardsley were duly assigned to the plaintiff before the action was commenced; that said building was constructed and repaired with the consent of Marks & Co. The complaint then alleges facts showing substantial compliance with the law under which the liens were filed. Marks & Co. filed a separate answer, denying that the building was constructed or repaired with their knowledge or consent; and denying the assignment of Hamilton and

Beardsley's claims to the plaintiff. The several allegations tending to show compliance with the statute are then denied. The answer alleges that plaintiff Hamilton's claims did not contain a true or any statement of his demand, after deducting all just credits and set-offs; alleges that said claims did not contain the name of the owner or reputed owner of the property sought to be charged, nor any description of the premises sought to be charged sufficient for identification, or any description of said property whatever, and that said claims are not verified. The like denials and allegations are then made respecting the claim of L. C. Beardsley. The answer of Johnson, the other defendant, is the same in all essential particulars, except that there is no denial that the work was performed and materials furnished with the knowledge and permission of Marks & Co. The case was referred, and the evidence taken in writing, and properly certified copies of the documentary evidence accompany the transcript. The court below found in favor of the plaintiff as to each of said liens, and rendered a decree establishing the same against the building only, and not against the ground upon which it stands. From this decree the defendants have appealed.

There is no controversy as to the performance of the labor or the furnishing of the materials for the building. The appellants contend that no sufficient compliance with the statute is shown to create a lien as to either of the claims described in the complaint. The notice filed by the plaintiff with the county clerk is as follows:—

"NOTICE OF MECHANIC'S LIEN.

"To whom it may concern: Notice is hereby given that the undersigned intends holding a lien for labor performed on the following described property: A story and a half house situated upon the John Leiser place, one mile or a mile and a half in a westerly direction from Roseburg, Douglas County, Oregon, said building owned by W. F. Owens, for the sum of one hundred and thirty dollars, for carpenter work performed from July 10 to September 14, 1886, on said building, at the request of W. F. Owens, the owner thereof.

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"Dated this twenty-fifth day of September, 1886.

"G. W. KEZARTEE.

"Subscribed and sworn to before me ——— 25, 1886.

"T. R. SHERIDAN, County Clerk.

"Filed and recorded September 25, 1886, vol. 1, page 32,
Mechanic's Lien Docket of Douglas County, Oregon.

"T. R. SHERIDAN, Clerk."

Hamilton's lien is as follows:—

"NOTICE OF MECHANIC'S LIEN.

"*To all whom it may concern:* Notice is hereby given that the undersigned, S. Hamilton, holding a lien for paints and materials furnished on the following described property, to wit: A story and a half house situated on the John Leiser place, one mile or a mile and a half in a westerly direction from Roseburg, Douglas County, State of Oregon, said building owned by W. F. Owens, deceased, for the sum of fifty-six and thirteen hundredths dollars, for paints and materials furnished upon said house from June 25, 1886, to September 22, 1886, at the request of W. F. Owens, the owner thereof.

"Dated this nineteenth day of October, 1886.

"S. HAMILTON.

"Subscribed and sworn to before me this October 19, 1886.

"JOHN LANE, Notary Public.

"Recorded October 19, 1886.

"T. R. SHERIDAN, Clerk."

And the following is a copy of the notice filed by L. C. Beardsley:—

"*To whom it may concern:* Notice is hereby given that I, L. C. Beardsley, of Douglas County, Oregon, was at the times hereinafter mentioned engaged in the business of lumber merchant at Roseburg, Oregon. That between July 16, 1886, and September 8, 1886, under an express contract with W. F. Owens, I furnished lumber and material to be used in repairing a certain dwelling-house and fence situated on a certain piece of land, known as a portion of the John Leiser donation claim, lying

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about one and a half miles northwest from Roseburg, Douglas County, Oregon. The bill of items of said materials is hereunto annexed, marked exhibit "A," and made a part of this notice, the total amount thereof being thirty and eighteen hundredths dollars (\$30.18). The said lumber and material was actually used in repairing the said dwelling-house and fence, under directions from W. F. Owens, who was legally in possession of said premises, under a contract of purchase, and a bond for a deed from S. Marks & Co., as I am informed and believe. That the said sum of thirty and eighteen hundredths dollars is now due, and no part of the same has been paid. That I am now the lawful owner and holder of said claim, and being desirous of availing myself of the benefit of an act of the legislature of the State of Oregon, approved February 11, 1885, entitled 'An act for securing liens for mechanics, laborers, material-men,' etc., I hereby declare my intention to hold a lien on said described building and property, to secure the payment of said sum of money, as by said act provided.

"ROSEBURG, OREGON, October 1, 1886.

"L. C. BEARDSLEY.

"STATE OF OREGON, }
"COUNTY OF DOUGLAS. } ss.

"I, L. C. Beardsley, being first duly sworn, say: The foregoing notice of lien, and the claims therein set forth, and each and every item thereof, is true and correct, as I verily believe.

"L. C. BEARDSLEY.

"Subscribed and sworn to before me this the first day of October, 1886.
JOHN LANE, Notary Public."

Prefixed to Beardsley's notice was an itemized account for lumber, amounting to \$30.18.

Hill's Code, section 3673, prescribes the manner in which notice of lien shall be given, and by whom and what it shall contain, as follows: "It shall be the duty of every original contractor, within sixty days after completion of the contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or *other person*, save the original contractor, claiming the benefit of this act, within thirty days after the completion of the alter-

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ation or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the county clerk of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, and also a description of the property to be charged with said lien, sufficient for identification, which claim shall be verified by the oath of himself, or some other person having knowledge of the fact."

1. The present lien law in this State is *blended* in its provisions, and the lien is extended to many structures, buildings, improvements, and erections not enumerated in the earlier statutes on that subject; and the course of legislation here has constantly tended toward the security by way of lien to all mechanics, artisans, builders, contractors, and all others who furnish materials or perform work and labor upon any of the erections or improvements enumerated in the statute. By the furnishing of materials or the performance of work and labor upon the property of another, they have added so much to its value, and the law has provided in the most liberal manner for their security. This being the object of the statute, the courts are bound to give every part of it full effect whenever its protection is invoked, and to see to it that its objects and purposes are not thwarted by a strained construction. Still, it must be remembered, the court cannot legislate. It can only enforce such laws as the legislative assembly may enact, and give effect to the rights set up under such statutes only upon the conditions and in the manner therein prescribed. Nor can the court adopt any rule of either strict or liberal construction applicable alike to every provision of such statute. Some of its provisions may require a liberal construction in furtherance of the legislative intent, while others may, in their application to particular cases, present hardships, such as compelling a person to pay twice for the same work or material, or creating a lien upon one's land without his consent, or the like, require a stricter rule of interpretation.

Appellant's counsel has presented various objections to each of these claims, which will now be separately noticed. ●

2. It is objected that these claims do not on their face state that the amount specified therein is due over and above all just credits and offsets; but it was held in *Whittier v. Blakesley*, 13 Or. 546, that this was not necessary; that it was sufficient if notice be given of the amount of the claim.

3. Counsel for appellants also object to the sufficiency of these notices, for the reason that the name of the owner of the land sought to be charged with the land is not specified therein. Beardsley's notice recited that the said lumber and material was actually used in repairing the said dwelling-house and fence, under directions from W. F. Owens, who was "legally in possession of said premises under contract of purchase and a bond for a deed from S. Marks & Co.," as he was informed and believed. Hamilton's notice says, "said building owned by W. F. Owens, deceased." Further, that he furnished the materials upon said house at the request of W. F. Owens, the owner thereof. And the plaintiff's notice recites that said building was owned by W. F. Owens, and that he performed said work on said building at the request of W. F. Owens, the owner thereof. It is the owner of "such building or other improvements" whose name must be specified in the notice, and not the owner of the land where the same is erected. It is no doubt true, if the claimant wishes to reach or affect the land with his lien, the notice must specify the name of such owner or reputed owner, if known, and unless he does so, the land will remain unaffected by the lien. In other words, such lien would not extend to the land where "such building or other improvement" might be erected. This requirement is one of substance, and cannot be dispensed with. (Phillips on Mechanics' Liens, § 345.)

There is more difficulty as to Beardsley's claim in this respect than there is in either of the others. Instead of stating directly the ownership of the house to be in Owens, he has stated facts which if true would tend to prove Owens' ownership. He has not stated title, but some facts which are evidence of some kind of title, namely, possession by Owens under a contract to pur-

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chase. This might not be enough to charge the land, or even Owens equitable interest therein, created by such contract, which it is not necessary to consider; but I can perceive no reason why it is not sufficient to extend the lien to the improvement or erection, leaving the land unaffected by the claim. The name of the owner of the building or improvement is given, and where the land happens to be owned by another, and in such case the lien not extending to the land, he can have no just cause to complain of the omission. The omission does him no injury.

4. Counsel for appellants also object to the sufficiency of these notices, for the reason that they contain no "description of the property to be charged with such lien sufficient for identification." It may be conceded that the description of the land is too indefinite and vague to be the basis or foundation of any lien thereon; but in this case it appears affirmatively that the land where the building was erected did not belong "to the person who caused said building or other improvement to be constructed, altered, or repaired," within the meaning of section 3670 of Hill's Code. What interest Owens had in the land, if any, does not appear. He may have had some kind of an equity, but there is not enough before us to enable us to say that he had. It is conceded that the legal title was then and still is in Marks & Co. In such case, and so far as appears from this record, the lien could only extend to the building or other improvement, and it would not be defeated by a failure to describe the land, if the building or improvement were sufficiently described for the purposes of identification.

5. Is the description of the house contained in these notices, upon which it is sought to fix these liens by this proceeding, sufficient? In determining this question, it must be remembered that there are no subsequent purchasers or lien holders to be affected. Every interest remains just as it was at the time the liens attached. No doubt a somewhat stricter rule would have to be applied in case there were junior encumbrancers or subsequent purchasers. (*De Witt v. Smith*, 63 Mo. 263.) The general rule as to what shall be sufficient description to sustain a mechanic's lien seems now to be, that if there appears enough

in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. (*De Witt v. Smith, supra*; *Bradish v. Jones*, 83 Mo. 313.) And in *Kennedy v. House*, 41 Pa. St. 39, it was held that if there be enough in the description of the locality and other peculiarities of the *building* to identify it—to point it out with reasonable certainty—with certainty to a common intent, the statutory requisition is complied with, and in regard to locality, there is great reluctance to declare a claim invalid for mere loose description. In such case it is held that the jury are generally to determine whether the property is in truth designated. So in *Ewing v. Barrass*, 4 Watts & S. 467, it is said that accuracy ought to be carefully attended to; but as claims are frequently filed by the material-men themselves, it would lead to injustice to hold that every mistake, however trifling, would avoid the lien. Only such as are calculated to mislead subsequent purchasers or creditors should destroy the claim. So, also, in *Knabb's Appeal*, 10 Pa. St. 186, a description which gave "the name of the owner, the locality of his building, Upper Providence Township, Montgomery County, Pa., bounded by the lands of Jacob Landis and others," the material of which the house was constructed, its dimensions, and number of its stories, was sufficient. So in *Tibbets v. Moore*, 23 Cal. 298, the lien was sustained when the erection was described as "a quartz mill at or near the town of Scottsville, in Amador County, known as 'Moore's New Quartz Mill.'" So in *Barker v. Conrad*, 12 Serg. & R. 301, a lien was sustained which described the building as "a three-storied brick house situate on the south side of Walnut Street, between Eleventh and Twelfth streets, in the city of Philadelphia." So in *Parker v. Bell*, 7 Gray, 429, the notice filed with the town clerk described the house as "a dwelling-house situated in D., on land now or formerly of B., and now said to belong to A.; said house is now near the dwelling-house of B.;" and it was held that this description was sufficient to secure a mechanic's lien on the house. And to the same effect is *McClintock v. Rush*, 63 Pa. St. 203; *City of Crawfordsville v. Boots*, 76 Ind. 32.

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6. Counsel for appellants also object to these "claims," for the reason they are not verified. Section 3673 of Hill's Code requires a claim to be filed with the county clerk, "which claim shall be verified by the oath of himself, or some other person having knowledge of the facts." This statute does not prescribe any particular form in which such verification shall be made. No doubt the better practice would be in the form of an affidavit to be annexed to the claim, to the effect that the facts therein stated are true; but the statute not having prescribed the form, we do not feel disposed to say that a claim signed by the party and verified by his oath is invalid. The present lien law was evidently designed to simplify the proceedings thereunder to a greater extent than any preceding statute in this State on that subject, and this form of verification may be all that the legislature designed. We therefore hold that these claims are verified. (*Laswell v. Presbyterian Church*, 46 Mo. 279.)

7. Counsel for appellants object specially to the claim of Beardsley, for the reason that it is for materials used in the repair of the house, as well as in the construction of a fence. This objection is fatal to this claim. The liens under this statute are specific; that is, they extend to the particular structure, building, or erection in or upon which the particular materials were used, or the particular labor was performed. In this case Mr. Beardsley had a lien upon the fence for the materials furnished and used in its construction, and he had another lien upon the house for the materials used in its repairs and construction; but he had no lien upon the fence for materials used in the house, nor upon the house for materials used in the fence. This is the construction which the former statute received in this court, and there is no reason why the present statute should receive a different construction. (*The Dalles L. & Manuf. Co. v. The Wasco Manuf. Co.* 3 Or. 527.) And similar statutes have received the same construction elsewhere. (*Fitzpatrick v. Thomas*, 61 Mo. 512; *Simmons v. Currier*, 60 Mo. 582; *Hill v. Braden*, 54 Ind. 72; *Hill v. Ryan*, 54 Ind. 118.)

The decree must be so modified as to exclude Beardsley's claim, and in all other respects the same is affirmed.

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[Filed January 2, 1888.]

JAMES A. VELSIAN, RESPONDENT, v. C. H. LEWIS
ET AL., APPELLANTS.

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VENDOR—TITLE TO PROPERTY—HOW DIVESTED.—It is the buyer's own fault if he is so negligent as not to ascertain the right of his vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his right or title to his property by his own act.

POSSESSION, UNAUTHORIZED—WHAT IS—CONVERSION OF CHATTELS.—A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which in the absence of evil intent in the purchaser cannot make rightful or lawful.

WAREHOUSEMAN—DEMAND—WHEN NECESSARY.—Where wheat was purchased from one without title, and the possession thereof is given the purchaser from a warehouseman, on the order of the seller and without the consent of the depositor of such wheat, *held*, that no previous demand is necessary to maintain an action of trover for its wrongful conversion.

APPEAL from Douglas County. Affirmed.

W. R. Willis, for Appellants.

J. W. Hamilton, for Respondent.

LORD, C. J.—This was an action in trover for the conversion of four hundred and twelve bushels of wheat. The complaint is in the usual form. On the ground that it did not state facts, etc., a demurrer was interposed, which being overruled, the defendants served, viz., Merrill and Lewis, filed separate answers, denying specifically each and every material fact alleged therein. Upon issue being thus joined, a trial was had, which resulted in a verdict and judgment for the plaintiff, from which this appeal is taken. The facts out of which the controversy arises are in substance these: The plaintiff had contracted to sell his wheat to one W. F. Owens, to be delivered at the warehouse at Dillard Station, and for which he was to receive his pay when the wheat was delivered. Dillard, who was the keeper of the warehouse, was to clean the wheat and to store it in his warehouse for him. Owens had made an advance of one hundred and fifty dollars to the plaintiff on his wheat, for which he had given his note, but which he paid after his

wheat was taken away without any authority or order from him. The defendant Merrill, who was buying wheat for the defendants Allen and Lewis, as their agent, went to the plaintiff to buy his wheat while he was threshing, but the plaintiff declined to sell, telling the defendant Merrill of his sale to Owens, and the advance he had received, and at the same time declined to receive when the plaintiff offered to pay the amount Owens had advanced. The plaintiff had delivered at the warehouse four hundred and twelve bushels of wheat in two-bushel sacks, marked No. 30, when Owens died. Just prior to this the defendant Merrill had bought of Owens a lot of wheat, and got an order to Dillard for it. A part of it included the wheat in controversy, as appears by the order of Owens to Dillard, and which directs the delivery of the wheat to Merrill, and to be shipped to his order. Dillard accepted the order, and by the directions of Merrill shipped the wheat to Allen and Lewis at Portland. The plaintiff never saw the order from Owens to deliver the wheat to Merrill, nor never asked Merrill, or Allen and Lewis for the wheat. The plaintiff testifies that "Dillard told me his warehouse was getting full, and asked if he could clean and ship that much (four hundred and twelve bushels), of my wheat. I told Dillard he could clean it, but did not tell him to ship it; I did not know who got the wheat except what others told me. I gave no order to take it." Dillard testifies that "I told him (plaintiff) that I had an order from Owens to ship the wheat on Merrill's order. I told him that my warehouse was getting full of wheat, and asked him if I could clean and ship this lot of wheat. He said I could clean it, and I understood him that I could ship it. He did not object to my shipping it on Owens' order. I cleaned it and put it out of the warehouse into the railroad cars to be delivered to Allen and Lewis at Portland." The evidence also shows that the reason the plaintiff made his contract that the money was to be paid when the wheat was delivered was, in his own words: "I had trouble last year about getting my money, and I made this arrangement so that I could get my money when the wheat was sold." Upon this state of facts, as far as relates to the wheat of

the plaintiff, it is clear that Owens sold it to the defendant Merrill as the agent of the defendants Allen and Lewis, without the consent of the plaintiff, and when he had no title to it, and could give no lawful or rightful order for its delivery to any one, and that Dillard exceeded his authority when he accepted such order, and by direction of the defendant Merrill put the wheat aboard of the cars and delivered it to the defendants without the consent of the plaintiff. Nor is this disputed, or that these acts do not constitute a wrongful taking or conversion as against them. But the contention of counsel for the defendants is, that where the purchase is made in good faith, although from one without title, and the possession is taken from one rightfully in possession, that the action of trover for a wrongful conversion is not maintainable without previous demand before suit, unless some subsequent acts of the purchaser make him guilty of a conversion. In a word, he seeks to place the transaction on the same footing as a sale by a bailee or warehouseman, and argues that as the buyer acts in good faith, his possession is lawful, particularly where he takes possession from a warehouseman who has the lawful possession of the goods. Hence he insists there is no wrongful taking or conversion without some other subsequent act of dominion or control inconsistent with the rights of the true owner. It is not perceived, however, how this view can aid the contention of the counsel for the defendants.

At first blush, it may seem strange that one who takes possession of goods or chattels under a contract of purchase, from one who had no right to sell, should be treated as a wrong-doer; but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer's own fault, if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert

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to that end, he must abide by the consequences of any mistake. (*Gilmore v. Newton*, 9 Allen, 171; *Spraight v. Hawley*, 39 N. Y. 141; *Hotchkiss v. Hunt*, 49 Me. 213.) Nothing can be plainer that "no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner and in hostility to his authority, and consequently, can neither acquire themselves, nor confer on the purchaser, any right or title of such owner. Mere possession of another man's property affords no evidence that the person having such possession has power to sell it, and he who purchases or intermeddles with it must see to it that he is protected by the authority of one who has power to sell." (*Dixon v. Caldwell*, 15 Ohio St. 412; *Spraight v. Hawley*, *supra*; *Cooper v. Newton*, 45 N. H. 337.) A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful. Such a possession is based on the assumption of a right of property, or a right of dominion over it, derived from the contract of sale; and what is this, in the legal sense, but a wrongful intermeddling or asportation or detention of the property of another? At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him, in a manner which is inconsistent with the rights of the lawful owner. (*Rapalje & Lawrence's Dictionary*.) "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." (*Cooley on Torts*, 428; *Ramsey v. Beezley*, 11 Or. 51.) It consists in the exercise of dominion and control over property inconsistent with, and in denial of the rights of the true owner, or the party having the right of possession. Said Shepley, J.: "The exercise of such a claim of right, or dominion over the property as assumes that he is entitled to the possession, or to deprive the party of it, is a conversion." (*Farwell v. Chase*, 37 Me. 290.)

The defendants, by taking possession under their purchase,

assumed an ownership, and exercised a dominion over the property inconsistent with the rights of the plaintiff as the true owner. "The very act," said Lord Ellenborough, "of taking goods from one who has no right to dispose of them is a conversion," and held the action of trover maintainable. (*Hurst v. Foster*, 2 Stark. 306.) "And again," said the same learned judge, "the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting the other in carrying his wrongful act into effect?" (*McComtre v. Davies*, 6 East, 538.) The taking possession of personal property under a contract of purchase is an act based on the assumption of ownership, or a right of dominion over the thing converted, where the vendor is without title, and although without evil intent, is a conversion for which trover lies without previous demand. The intent with which the wrongful act is done on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. It is the effect of the act which constitutes the conversion. (Edwards on Bailment, § 162; Cooley on Torts, 534, 538, 688; *Flanders v. Colby*, 28 N. H. 34; *Boyce v. Brockway*, 31 N. Y. 490; *Morrill v. Molton*, 40 Vt. 242.) Hence the conversion may consist simply of a purchase, even by an innocent party, of goods or other personal chattels from one who has himself been guilty of a conversion in disposing of them, where the buyer takes the goods or chattels into his possession or custody. The authorities to this point are numerous and overwhelming. As trover and replevin are concurrent remedies for the owner whenever the taking is wrongful, any case in which replevin without a demand has been supported is an authority for the maintenance of trover. In *Galvin v. Bacon*, 11 Me. 29, the plaintiff being the owner of a horse bailed him to A for use for a limited time, under the expectation of a purchase by the latter. During the time, A, for a

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valuable consideration and without notice, sold the horse to B, and he in like manner to the defendant. *Held*, that no previous demand was necessary to enable the owner to maintain replevin against the last purchaser. The court say: "Whoever takes the property of another, without his assent, expressed or implied, or without the assent of some one authorized to act in his behalf, takes it in the eye of the law tortiously. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude."

In *Hyde v. Noble*, 13 N. H. 494, it was held that a party purchasing property from one who has no right to sell, and holding it to his own use, is guilty of a direct act of conversion, without any demand and refusal. Parker, C. J., said: "The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they by their purchase undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing property from one who had no right to sell, and holding it to their own use, is a direct act of conversion, without any demand or refusal. Their possession was unlawful at its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where the party obtains the possession lawfully, that it is necessary to show a demand and refusal." In *Freeman v. Underwood*, 66 Me. 233, the court say: "But the defendants by the purchase and possession of the berries, although acting in good faith and in ignorance of the want of title in their vendors, assumed thereby an ownership, and exercised a dominion over the property, which rendered them liable in trover to the true owner, without any demand therefor." In *Farley v. Lincoln*, 51 N. H. 579, the court say: "At the time of the assignment the plaintiffs were the absolute general owners, and were entitled to the immediate possession of the goods. The assignment passed no title, and

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conferred no right upon the defendant in respect of the goods as against the plaintiffs, for the obvious reason that Sanborn had no right or title in them as against the plaintiffs which he could confer on anybody. This being so, the first act of possession exercised by the defendant over them was inconsistent with and in derogation of the plaintiffs' rights. Absolute ownership draws possession after it. If, then, the defendant's act in taking possession was an interference with the plaintiffs' right of actual possession growing out of the ownership, it was in legal effect a disturbance of their constructive possession. The defendant's act in assuming dominion over the property was none the less an invasion of the plaintiffs' right, and none the less a trespass, because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law that intention is of no account in a civil action brought by one man to recover damages for a wrongful interference with his property by another."

In *Stanley v. Gaylord*, 1 Cush. 536, which is a leading case, it was held that a *bona fide* purchaser from one who had the actual possession of the property, but without any right to retain possession as against the lawful owner, and an actual taking of it under such purchase into custody of the purchaser, would subject him to an act of trespass or trover at the suit of the lawful owner without any previous demand. In *Trudo v. Anderson*, 10 Mich. 358, it was held that where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand, and that he may do this notwithstanding the property is in the hands of one who has purchased it in good faith, and without notice of the title of the real owner. "Why," said Christian, J., "should the right of the plaintiff to recover his property be made to depend upon the good faith of the defendant, when that good faith is no defense against the plaintiff's right of property or possession when a previous demand has been made. . . . We do not think the question of intent or good faith in a party receiving possession from a wrongful taker in such cases, and

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where the owner has been guilty of no negligence or wrong, can have any bearing on the right of recovery in a civil suit for the property, or its value; and such is clearly the weight of authority both in England and the United States." And in a late case in the same State (*Hake v. Buell*, 50 Mich. 90), it was held that trover for goods sold without the owner's authority or ratification may be brought against the purchaser without formally demanding the goods beforehand. In *Wells v. Rayland*, 1 Swan, 501, it is held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion, and that from the time of the commission of that act the statute will commence running. In *Harpening v. Meyer*, 55 Cal. 557, it was held that when the possession of property is obtained—in good faith or otherwise—from one who has no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary.

So far as can be readily obtained, the weight of authority in England and the United States is that a demand is deemed unnecessary. (See Maine: *Parsons v. Webb*, 8 Greenl. 38; *Whipple v. Gilpatrick*, 19 Me. 427; *Galvin v. Bacon*, 11 Me. 28; *Freeman v. Underwood*, 66 Me. 427; *Bodick v. Coburn*, 68 Me. 170; *Prime v. Cobb*, 63 Me. 202. Massachusetts: *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water-Power Co.* 11 Cush. 11; *Chapman v. Cole*, 12 Gray, 141; *Gilmore v. Newton*, 9 Allen, 171; *Heckle v. Lurvey*, 101 Mass. 344; *Carter v. Kingman*, 103 Mass. 517; *Bearce v. Bowker*, 115 Mass. 129. Michigan: *Trudo v. Anderson*, 10 Mich. 357; *Hake v. Buell*, 50 Mich. 90. Illinois: *Gibbs v. Jones*, 46 Ill. 319. Nevada: *Whitman Mining Co. v. Trelle*, 4 Nev. 494; *Ward v. Carson R. W. Co.* 13 Nev. 44. California: *Harpening v. Meyer*, 55 Cal. 557. Mississippi: *Johnson v. White*, 21 Miss. 584. Kansas: *Shoemaker v. Simpson*, 16 Kan. 52. Arkansas: *McNeil v. Arnold*, 17 Ark. 154. New Hampshire: *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v.*

Jones, 30 N. H. 164; 51 N. H. 579. Pennsylvania: *Carey v. Bright*, 58 Pa. St. 70. Vermont: *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Courtes v. Kane*, 32 Vt. 232; *Deering v. Austin*, 34 Vt. 330; *Bucklin v. Beale*, 38 Vt. 653. Georgia: *Robinson v. McDonald*, 2 Ga. 116. Wisconsin: *Eldred v. Oconto Co.* 33 Wis. 133; *Oleson v. Merrill*, 20 Wis. 487. Maryland: *Harker v. Dement*, 9 Gill, 7. Tennessee: *Wells v. Rayland*, 1 Swan, 501. Oregon: *Surler v. Sweeney*, 11 Or. 24. *Contra*, New York: *Barrett v. Warren*, 3 Hill, 348; *Tallman v. Turck*, 26 Barb. 167. But see *Bates v. Conkling*, 10 Wend. 389. Indiana: *Wood v. Cohen*, 6 Ind. 455. Connecticut: *Parker v. Middlebrook*, 24 Conn. 207.)

It will be noticed that the New York authorities distinguish a delivery to the purchaser, and a taking of the property out of the vendor's possession. (*Nash v. Mosher*, 19 Wend. 431; *Ely v. Ehle*, 3 Comst. 506; *Fuller v. Lewis*, 13 How. Pr. 49.) It was said in *Ely v. Ehle*, "if the goods be delivered by the bailee, trespass lies not against the person to whom they are delivered; but if sold or taken without delivery, trespass would lie for the taking," etc. And in *Barrett v. Warren*, 3 Hill, 348, it was held to be a general rule that trespass will not lie against one who comes to the possession of goods by delivery without fault on his part, although it should turn out that the person who made the delivery had no title and was a wrong-doer. Without approving these subtle distinctions, still in that view, their application cannot be fitted to the facts of this record. When Dillard, the warehouseman, accepted the order, and by which he agreed to ship the wheat on Merrill's order and by his direction, he acted in derogation of, and in hostility to the rights of the plaintiff, his bailor, and in violation of the terms of the bailment, which the plaintiff, it would seem, was authorized to treat as terminated. Their evident purpose was by their act to affect the possession of the wheat in recognition of the rights of ownership derived from the sale by Owens. Certainly, the bailment terminated when Dillard, by direction of Merrill, and in obedience to his order, took the wheat of the plaintiff from the warehouse without his consent and put it aboard of the

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cars, consigned to his principals, the defendants Allen and Lewis, as their property. The effect of such acts or conduct was to restore his bailor, the plaintiff, to his right of possession. Nor were the defendants—considered as one—the mere passive recipients to whom the wheat was delivered. It was they who took the active initiative, and put in motion the overt act which took and put the wheat, or delivered it aboard the cars as their property, whereby the plaintiff lost control of—was deprived of his property. It was not on his own motion that Dillard removed the wheat from the warehouse to the cars; he did it at the instance of the defendant Merrill, the agent of the defendants Allen and Lewis, and he acted for him and upon his order when he wrongfully took the wheat from the place where it was deposited, and put it aboard of the cars for the purpose of asportation, consigned to Merrill's principals, the defendants Allen and Lewis, as their property. So that in this view, it cannot aid the case of the defendants, although the law, as already shown, is decisive of this case, without resort to such subtle distinctions.

There is also another phase of this case to which it is necessary to advert. It is not clear that the defendant Merrill was in the situation of a person who dealt in good faith and in ignorance of the plaintiff's title. Leaving out of the question that after the purchase from Owens and the acceptance of his order on the warehouseman, that the wheat was subsequently taken and removed upon Merrill's order, the whole testimony, as well as his own, tends to show a state of facts from which it might be inferred, on grounds of ordinary business prudence, that he knew the nature of the contract between Owens and the plaintiff. The evidence discloses that he sought the plaintiff for the purpose of purchasing his wheat, and found out from him of his sale to Owens. It is hardly to be supposed that he would offer to pay the advance which Owens had made without making inquiry into the facts, and that when the plaintiff refused to substitute him to the place of Owens, he understood the ground of such refusal. It is probable that he expected, and at that time seemingly without danger from a knowledge, perhaps, of a

fancied security in the character of the person with whom he was dealing, that the contract between Owens and the plaintiff would work out all right, and that what was done might be done without incurring any great risk. Still if he knew that Owens was without title, whatever may have been his reliance in the matter, and bought the wheat, he was bound to know that Owens had no right to give an order for its delivery, to be shipped subject to his order, and that the warehouseman Dillard had no right to accept such order, or deliver the wheat to him for his principals, or to be transported to them without the consent of the plaintiff. In such a case, it would seem that no demand was necessary. Again, I am inclined to think that the defendants are chargeable with notice of the duties which the law imposes on a warehouseman, whose employment in its nature is public, and the relation which he sustains to his depositors understood. And among these duties, the chief of which is, not to deliver the goods or grain deposited to any person other than the depositor, except on his order, or by his consent or authority.

There is no pretense that the defendants, or any of them, had such consent, nor did Dillard, according to the verdict. It would follow, then, if the defendants are chargeable with notice of his want of authority to deliver, even their reception of the wheat would be a wrongful taking, and therefore render a previous demand unnecessary. However this may be, cases of the kind under consideration bear no analogy to, and stand on a different footing from those where the owner of property clothes another with the apparent title or power of disposition, whereby third parties are induced to deal with him. In such cases, the principle is well settled that such innocent purchasers shall be protected in their title. But the rights of such purchasers do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes or estops him from disputing, as against them, the existence of the title, or power which he caused or allowed to appear to be vested in the party making the sale or conveyance. (*Cowdrey v. Vandenburg*, 101 U. S. 572.) Hence

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it has been held where one deposits wheat for storage, knowing that it is to be commingled with wheat purchased by the owner of the warehouse, and that the latter is selling and publicly shipping from the common mass, he thereby confers an apparent ownership and authority to sell, and is estopped to assert his title as against an innocent purchaser in the usual course of business. (*Preston v. Wetherspoon*, 109 Ind. 457.) In the case at bar, the party selling had no *indicia* of ownership or power to sell, or the warehouseman authority to deliver, so that neither title was conferred, nor lawful possession given or taken, which precluded the plaintiff as owner from asserting his title and the right to the immediate possession of his property as against the purchasers, however innocent of evil intent, by suit without previous demand. "They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they by the purchase undertook to control it as their own property. This was an assumption of power over it inconsistent with the rights of the plaintiff." (*Hyde v. Noble, supra.*) The possession of the defendants was not a *mere* custody, without reference to the question of title or ownership of the property, as in the case of a common carrier who receives property from one not rightfully entitled to the possession and in ignorance of the title of the true owner; but it was a possession given and taken in pursuance of the contract of sale, and on the assumption of ownership, and the right to exercise dominion and control over it. In such case, good faith, or the absence of evil intent, cannot infuse validity into the transaction, nor make a possession rightful which is exercised in derogation of the rights of the true owner to control and enjoy his property. Nor is the plaintiff "bound to tender an issue, or litigate a question upon the grievance or innocence of a party who contests his right to the property," and by his evidence shows that he claimed it adversely to him.

The judgment must be affirmed.

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[Filed January 2, 1888.]

ALLEN AND LEWIS, APPELLANTS, v. AGEE AND MILLER, RESPONDENTS.

POSSESSION—DELIVERY OF—WHEAT IN.—The agent of appellants bought wheat in a warehouse and left orders for its delivery on board the cars, which was done, and the cars placed on a side track awaiting transportation. In this condition the defendants, being a sheriff and his deputy, seized the wheat by virtue of a writ of replevin sued out by B. & B., who asserted title thereto. *Held*, the delivery was complete.

APPEAL from Douglas County. **Reversed.**

Facts are stated in the opinion.

J. W. Hamilton, and *J. P. Watson*, for Appellants.

W. R. Willis, for Respondents.

LORD, C. J.—The plaintiffs are partners, doing business under the firm name of Allen and Lewis. The complaint alleges in substance that plaintiffs are the owners and entitled to the possession of three hundred and fifteen sacks of wheat marked No. 13, of the value of four hundred and eight dollars, and in possession of R. Koehler, receiver of the O. & C. R., a common carrier, delivered to him by plaintiffs to be carried from Dillard to Portland, Oregon. That on the twenty-fifth day of September, 1886, at Dillard, Douglas County, Oregon, defendants wrongfully took the same from the possession of said Koehler, and detained the same to the plaintiffs' damage, etc. After denial, the defendants for a separate answer allege, in substance, that the firm of Bremner and Buxton were the owners of this wheat, and that on the twenty-fifth day of September, 1886, commenced an action to recover the same from W. F. Owens and J. M. Dillard, and by an indorsement on the affidavit filed therein, required the defendant B. C. Agee, sheriff, "to take said property in the complaint herein described into his possession"; that the wheat was in the possession of the defendant James Dillard as warehouseman; that said affidavit and indorsement therein, with an undertaking, was delivered to defendant Agee, and that

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defendant Miller was his deputy, and that the defendant Miller, on the date aforesaid, in accordance with said authority, took said property into his possession from the defendant James Dillard, etc.; and further, that the property taken was the property of said Bremner and Buxton, and that they were entitled to the possession.

The reply put in issue the material facts, and the trial resulted in a verdict and judgment for the defendants, from which comes this appeal. The evidence as disclosed by the bill of exceptions is to this effect: That one Merrill, at the times mentioned, was the agent of the plaintiffs in buying and shipping wheat; that the wheat in dispute had been stored in the warehouse of James Dillard, at Dillard Station, by Messrs. Bremner and Buxton; that Merrill purchased a lot of wheat subsequently of W. F. Owens, including the wheat in dispute, for which he (Owens) gave him an order on Dillard in writing, who accepted the order in writing on the twentieth day of September, 1886; that Bremner and Buxton gave their written order to J. M. Dillard to ship their wheat subject to the order of W. F. Owens; that the railroad company had no regular agent at Dillard Station, but when notified that goods were to be transported left cars on the side track at the warehouse to receive them; that Merrill ordered the cars of the agent at Roseburg sent out to Dillard to receive the wheat, and had him make out shipping receipts for three car loads; that the cars were sent there in accordance with his directions, and loaded with wheat by Dillard out of his warehouse, including the wheat in dispute, who made out his memoranda, "locked the cars, and left them for the train, and had nothing more to do with the wheat or cars;" that subsequently, and on the twenty-fifth day of September, 1886, Messrs. Bremner and Buxton, as plaintiffs, commenced an action against Owens and Dillard, as defendants, to recover said wheat, and that the defendants in the present action as such officers as alleged on the order referred to, and on the day last aforesaid, took the wheat in controversy out of the cars in which it was loaded into their possession. From the pleadings and the evidence thus adduced, it will be seen that the trial was devoted mainly to determining

who had possession of the wheat at the time the defendant officers took it from the cars in the action of *Bremner and Buxton v. Owens and Dillard*.

The error assigned in the instructions given by the court are all directed to this point, that the evidence showed a delivery to the railroad and a possession by them for the plaintiffs. This is the contention of counsel for the plaintiffs, and is the marrow of the case. The purchase and the authority to deliver the wheat is not disputed, only that any actual possession of the property had been taken by the railroad company. The evidence shows that the railroad company placed the cars on the side track at the warehouse, at the instance of the agent of the plaintiffs, for the purpose of receiving, with other, the wheat in dispute for the plaintiffs, and that it was removed from the warehouse and put in the cars in pursuance of this purpose, and by rightful act duly authorized. But it is contended that this did not constitute a delivery of the wheat to the plaintiffs, because the company having no regular agent at that place, there was no acceptance, and consequently, that the wheat still remained in the possession of Dillard at the time of the seizure by the defendant officers. The agent of the plaintiffs, or what is the same thing, the plaintiffs, were the contractors for the shipment of this wheat; their agent had not only selected the railroad company as its carrier, but by agreement, the company had sent its cars at the place designated by him to receive the wheat for the plaintiffs, and when in pursuance of that agreement, the wheat was delivered aboard of the cars, it must necessarily have been with their knowledge and consent.

In *Ill. Cent. R. R. Co. v. Smyster & Co.* 38 Ill. 360, the court say: "The side track and the cars belong to the company, and are under their exclusive control; and there is no question that the company placed this car at a point opposite the wharf boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. The company had unquestionably the exclusive use and control of their road, side tracks, and freight cars; no use could be made of them

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without the consent of the company. So long as a car remained on their road or side track it was under their control, and necessarily in their possession. They had the right to permit their cars to stand at the point at which this one was placed. The company at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of the road, but the commission merchant has no such right, even if he had possessed the means. The wharf boat, on the contrary, was in the possession of the commission men, and the cotton so continued until it was placed in the car. It there passed into possession of the company as effectually as if it had been delivered in their warehouse. They substituted their car for their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest, is the prosecution of the business for which it was created. If this was a box car, the company had the right as soon as the cotton was placed in it to have closed and locked it, or if an open car, they had an equal right to have secured the cotton, and any person interfering with it would have been a trespasser, and the company could have recovered damages for the injury thus perpetrated. No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side track; or whether it is placed there by their employees or by other persons, so it is done with the assent of the company."

The case in hand possesses all these features, strengthened by some other additional facts. Here the side track and the cars belonged exclusively to and were under the control of the company. They placed their car on the side track at the warehouse, by request and agreement, where the grain in dispute was stored, for the express purpose of having it transferred from the warehouse to the car, that they might transport it to the point desired by the shipper. Nor could any one use and control their road, side track, and freight cars without their consent, and necessarily they must have been in their possession. When the cars were loaded the company could move them, but no other person could without their consent. Dillard says he had authority to load

the cars, and the company had given him the keys, and he testifies that "he loaded the wheat, locked the cars, and left them for the train to take, and had nothing more to do with the wheat or cars." Could any acts be more decisive of a delivery to, or acceptance by the carrier or company, than by placing cars at a side track of a warehouse and giving keys to the person authorized to load the cars, and his putting the wheat aboard of them and locking them up? Could it be said in such a case that the wheat was put in the car without the knowledge or consent of the company? Or can it be doubted that when the wheat was taken from the warehouse and placed in the cars, that it did not then pass into the possession of the company as effectually as if it had been delivered in their warehouse? In this case, the cars of the company took the place of a warehouse, and it was done not only for the mutual convenience of the parties, but by an express understanding with the company that the cars should be placed by them on the side track at the warehouse to receive the wheat, and when loaded on the cars in accordance therewith, necessarily was done with the knowledge and assent of the company, and consequently was a delivery to or acceptance by them, which is one and the same thing. The wheat, therefore, was not in the possession of Dillard and Owens, but of the company for the plaintiffs, and was a good delivery to the defendants.

The further objection was also made to the admission of the affidavit for delivery and indorsement thereon against objection, on the ground that it did not sufficiently describe the property, and that the statute was not complied with or followed in the order for taking the property from *the defendant*. The court entertains some doubts as to the sufficiency of the order, for the last reason suggested, but has concluded to pass it.

The judgment must be reversed.

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[Filed January 2, 1888.]

I. R. DAWSON, ASSIGNEE, APPELLANT, v. PERINE
GEORGE MARIA, ET AL., RESPONDENTS.

GARNISHEE—ANSWER OF.—The answer of a garnishee which simply denies in *hæc verba* the allegations of the complaint does not raise an issue, and the complaint will be taken as confessed, and judgment rendered against the garnishee, where it appears that such denials were deliberately made.

SAME.—Doubtful and evasive answers should be taken against the garnishee. (Drake on Attachment, § 377; Wade on Attachment, § 633.)

APPEAL from Douglas County. **Reversed.**

W. R. Willis, and *J. W. Hamilton*, for Respondents.

R. Williams, and *Milton W. Smith*, for Appellant.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Douglas, rendered in garnishee proceedings.

It appears that the firm of Anlauf Bros. became insolvent, and made an assignment to the appellant I. R. Dawson, for the benefit of creditors. That said assignee thereupon commenced an action at law in said Circuit Court against said Perine George Maria and others, designated as partners under the company name of Maria & Co., and that subsequently appellant, as such assignee, recovered a judgment in said action against said Perine George Maria and others, for the sum of \$2,014.32, damages and costs, and thereafter caused an execution to be issued upon the said judgment to the sheriff of said county of Douglas, who served a certified copy of the same upon said respondents, together with a written notice, specifying, in effect, that by virtue of the said execution he levied on all moneys, credits, and property, of whatsoever nature, in their hands, or either of them, belonging to the defendants, in the writ of execution, or either of them, then, or to become due, and especially the sum of \$2,150, the balance due the said defendants on account for the wood which they cut on the Roger De Loney place, in said county, and sold to respondents, under the firm name of Krewson & Co., and for which they owed defendants an unpaid

balance of \$2,150. The respondents, by the said Joseph Cellers, furnished to the said sheriff a certificate, in response to the said notice of garnishment, in which they denied that the firm of Krewson & Co. owed the said defendants anything at all, stating therein, in substance, that they never had been, and were not then, in any way indebted to said Maria & Co., in any sum whatever, and had not in their possession, or under their control, any property, money, or credits whatever, or under the control or in the possession of either of the members of the firm of Krewson & Co., belonging in any way to said Maria & Co.

The appellant, not being satisfied with the said certificate, procured an order from the said court, requiring the respondents to appear for examination touching said matter, and filed allegations and interrogatories in the proceeding thereon. The following is the substance of the amended allegations so filed: That the appellant obtained the judgment against the said defendants; that it remained unpaid; that the execution was issued upon the judgment and placed in the hands of the sheriff, and the proceedings had thereon, as before mentioned; that the certificate was unsatisfactory to appellant, and was the only one furnished; that the said respondents were at the time of the service of the said execution, which was on the eighth day of May, 1885, indebted to a part of the defendants, viz., G. Gotardi, G. Venturini, V. Dominico, A. Mazza, B. Venturini, P. Dominico, B. Venturini, G. Mazza, and P. Stetani, in the sum of \$2,150, on account for wood which said defendants cut and piled on the premises of one Roger De Loney, in Pass Creek Canyon, Douglas County, State of Oregon, amounting to about 1,200 cords. That said defendants, on or about the —— day of May, 1883, under the firm name of Gotardi & Co., then and there, on said premises of said Roger De Loney, in said Pass Creek Canyon, sold and delivered to the said garnishees, J. W. Krewson and Joseph Cellers, as partners, under the firm name of Krewson & Co., the whole of said wood, for the agreed price of \$2.50 per cord for said wood, less the sum of ten cents per cord for stumpage, for all of said wood which the said defendants should haul to the railroad track for the said garnishees; and \$2.50 per

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cord, less ten cents per cord for stumpage, and sixty-five cents per cord for hauling, for all of said wood which the said defendants should not haul. That said defendants hauled to the railroad track, for said garnishees, 100 cords of said wood, and did not haul the 1,100 cords thereof; and that thereby said garnishees became indebted to, and promised to pay defendants as partners, under the firm name of Gotardi & Co., the full sum of \$2,150. That said garnishees furnished to defendants, under said firm name of Gotardi & Co., goods, wares, and merchandise of the value of \$200, and not exceeding that sum, for which they were entitled to a credit on the said indebtedness, and that they had paid defendants no greater sum thereon at the time the notice of garnishment was served upon them. And the appellant demanded judgment against respondents, said garnishees, that they be required to answer under oath concerning the purchase of said wood, and that the appellant have judgment against them for \$2,150.

To the said allegations the said garnishees answered, denying that appellant recovered any judgment as alleged, or caused an execution to issue thereon, or that it was served upon the garnishees, or that they were indebted to the defendants named in the sum claimed, or in any sum, on account for wood cut as alleged.

The respondents also made the following denials: "Denies that said defendants last above named, on or about the —— day of May, 1883, or at any other time, under the firm name of Gotardi & Co., or any other firm name, then and there, on said premises of the said Roger De Loney, in said Pass Creek Canyon, in Douglas County, Oregon, sold and delivered to the said garnishees, J. W. Krewson and Joseph Cellers, as partners under the firm name of Krewson & Co., or otherwise, the whole of said wood, or any part thereof, for the agreed price of \$2.50 per cord for said wood, less the sum of ten cents per cord for stumpage, or any other price, for all or any of said wood which the said defendants should haul to the railroad track, or elsewhere, for said garnishees, or \$2.50 per cord, less the sum of ten cents per cord for stumpage, and sixty-five cents per cord

for hauling, or any other price, for all or any of said wood which the said defendants should not haul. Denies that said defendants hauled to the railroad track, or elsewhere, for the garnishees, 100 cords, or any part thereof, of said or any wood. Denies that thereby, or otherwise, the said garnishees, J. W. Krewson and Joseph Cellers, as partners under the firm name of Krewson & Co., or otherwise, became indebted to, or promised or agreed to pay to the last aforesaid defendants, as partners under the firm name of Gotardi & Co., or any other firm name, the full and just sum of \$2,150, or any part thereof. Deny that they now owe the full and just sum of \$2,150, less the credit for the aforesaid goods, wares, and merchandise, or any part thereof."

Thereafter said cause came on for trial, and the said allegations, interrogatories, and answers thereto were submitted to the said Circuit Court, and whereupon the said court found that the appellant, as such assignee, recovered the judgment mentioned in said allegations against the parties, at the time, and for the amount therein alleged; that the execution was issued, levy made, and notice given, as also alleged in said allegations. Also, that on or about May 20, 1883, said respondents purchased of a company of Italians, doing business under the firm name of Gotardi & Co., about 600 cords of wood cut by said Gotardi & Co., on the premises of Roger De Loney, in Pass Creek Canyon, in Douglas County, Oregon, of the reasonable price and value of \$1,060; that respondents paid on the purchase price of the wood, in goods, wares, and merchandise, the sum of \$233.36, and that nothing more had been paid on said purchase price; that there was on the eighth day of May, 1885, and still was due said firm of Gotardi & Co. from respondents, the sum of \$816.64; that no evidence was offered or admitted on the trial of the case, showing or tending to show the names of the persons comprising said firm of Gotardi & Co., and that the court was unable therefrom to determine; and that no evidence was offered or admitted on the trial showing, or tending to show, that on May 8, 1883, or at any time, the respondents were indebted to a part of the defendants in said execution, consisting of the several defendants therein, before named, or either of

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them, on account, for wood, as alleged in said allegations, or that said defendants referred to, on the ——— day of May, 1883, or any other time, under the firm name of Gotardi & Co., or any other firm name, sold said wood, or any wood, to respondents; that G. Gotardi, named as one of the defendants in said action by the appellant as assignee, was the senior member of the firm of said Gotardi & Co., but that from the evidence in the case, the court could not find who the other members of said firm of Gotardi & Co. were, but that the evidence did show that there were ten men in said firm.

In a subsequent finding by the court, it was found that the contract between the respondents and Gotardi & Co., in reference to the sale and purchase of the said wood, was in writing, though the writing was not in evidence at the trial; and the court found that the evidence as to its contents was indefinite. From these findings of fact, and others, which do not affect the merits of the question involved, the court found as conclusions of law that the respondents were not liable upon the garnishee proceeding; that under the evidence in the case the respondents, at the time of the service upon them of the copy of the execution and notice, had no property of the defendants in the writ, or any of them, liable to execution, and were not owing said defendants, or any of them, any sum of money, and that the respondents were entitled to a judgment against appellant for their costs. Upon which findings the judgment appealed from was entered.

The main question presented upon the argument for our consideration was that the respondents, in their answer to the allegations, failed to deny that the several defendants, whose names are set out in the allegations, and were alleged therein to have sold the wood under the firm name of Gotardi & Co. to the respondents, were not the members of said last-named firm.

The allegation is, that the defendants named, on, etc., under the firm name of Gotardi & Co., on the premises of Roger De Loney, in Pass Creek Canyon, etc., sold, etc. The respondents deny that the defendants named, on, etc., or at any time, under the firm name of Gotardi & Co., or any other firm name, on the premises of Roger De Loney, in Pass Creek Canyon, etc., sold,

etc. The denial is almost in the precise language of the allegation. Strictly, it only amounts to a denial that the particular defendants, under any firm name, on the premises of Roger De Loney, in Pass Creek Canyon, sold to the respondents the wood. If the denial had been put in the shape it is through inadvertence, I should not have deemed the question raised as entitled to any consideration. But under the circumstances of this case, it indicates method. Its lack of fullness and explicitness smacks of design. The members of the firm of Gotardi & Co. were a gang of Italian wood-choppers, with unpronounceable names, only one of whom, according to the testimony of J. W. Krewson, given in answer to one of the interrogatories filed with the allegations, could speak good English, that was Gotardi himself. The appellant, nor the creditors he represented, could be expected to know them. But the respondents did know them. At least they dealt with them, purchased the wood of them, and are presumed to have known them. And it is quite evident that the respondents sought to take advantage of this condition of affairs, and framed their answer in view of that object.

The appellant's allegation, as to the sale of the wood to the respondents, does not, in direct terms, state that the defendants named were the members of Gotardi & Co., but that is the necessary inference to be drawn therefrom; and the only ingenuous mode of answering it would have been to deny that they were such members, and to have pointed out who were the members thereof. The respondents occupied the position of stake-holders in the affair; they had no interest in preventing the application of the debt to Gotardi & Co. from being applied upon the debt due from Maria & Co. to Anlauf Bros., further than to protect themselves from having to pay it again to Gotardi & Co.; and instead of filing the stinted answer, denying only in *hæc verba* the allegations referred to, they should have disclosed the facts of the case. That would have evinced good faith upon their part. But they evidently determined to stand upon what they regarded as their strict legal rights; and having chosen that course, they must expect that a strict construction of the law will be applied against them as well.

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In accordance with technical rules of pleading, only the immaterial parts of the allegation referred to are denied. The respondents deny that they bought the wood of the particular defendants named; deny that they bought it of them as a firm, and deny that they bought it of them on the premises of Roger De Loney, in Paas Creek Canyon. These denials may be true, yet they do not controvert the material parts of the allegation. The defendants named may not have been the identical persons who sold the wood to respondents, and yet not affect the rights of the parties to the proceeding a partice. G. Venturini or V. Dominico may never have been a member of the firm of Gotardi & Co.; that firm may have only included the other defendants named. The denial then would be true, but wholly immaterial; or some of the defendants named may have been successors to, and assumed the liability of others who were members of the firm when the wood was purchased. Such fact might exist consistently with the denial. It may have been, and I think very likely was the fact, that no copartnership firm under the name of Gotardi & Co., or any other firm name, really existed; that the said defendants named were merely, as a matter of law, tenants in common of the wood, and that they sold it to the respondents jointly, as individuals. In that case the denial would be true, but immaterial. And the wood might have been sold to respondents at any other place than the premises of Roger De Loney. That fact would not affect the rights of the parties, nor be inconsistent with the denial. Doubtful and uncertain answers are construed against a garnishee. It has been held that where they are equivocal and evasive, the allegations would be taken *pro confesso*. (Wade on Attachment, § 377; Drake on Attachment, § 633.) Under the view here expressed, the answer of respondents must be regarded as frivolous, and insufficient as a denial to controvert the material averments in the allegations filed in the proceedings of garnishment. The judgment appealed from will therefore be reversed, and the case remanded to the said Circuit Court, with directions to enter a judgment therein in favor of the said appellant for the sum of \$816.64, found due from the respondents to Gotardi & Co., together with the inter-

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est thereon at the rate of eight per cent per annum, from the eighth day of May, 1885, and the costs and disbursements of the said proceeding, and that the appellant recover his costs and disbursements in this court.

15	563
47	181
47	183

[Filed January 8, 1888.]

JAMES A. BUCHANAN, RESPONDENT, v. GEORGE A. BECK, APPELLANT.

ACTION—MONEY HAD AND RECEIVED FOR.—In order to maintain an action for money had and received by one for the use of another, the complaint must plead facts showing that the money justly belonged to the plaintiff.

SAME.—Proof that the money legally became the property of the defendant would defeat the action, unless the plaintiff could show that by a subsequent arrangement the money was still his, and in order to make such proof available the facts relied upon must have been pleaded.

NONSUIT—WHEN GRANTED.—The testimony submitted in this cause was not sufficient to have been submitted to the jury under the pleadings, and a nonsuit should have been granted.

APPEAL from Multnomah County. Reversed.

George W. Yocum, and R. & E. B. Williams, for Appellant.

Zera Snow, for Respondent.

THAYER, J.—This case was begun in the Justice's Court for North Portland precinct in said county. The respondent filed in that court a complaint against the appellant, in which he alleged "that in the month of July, 1886, the defendant [appellant herein] had and received of and from the plaintiff [respondent herein], and for and to plaintiff's use and benefit, one hundred and twenty-five dollars, in manner as follows: In the month of July, 1886, plaintiff paid over to the defendant the sum of one hundred and twenty-five dollars, for and in consideration of which defendant promised to sell and deliver to plaintiff, within a reasonable time thereafter, an American horse, sound, and fit, and suitable for a lady's driving horse." Then followed an alleged breach of the promise, and

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refusal upon the part of the defendant to comply therewith, and demand for judgment for said sum of money. The appellant in his answer to the said complaint denied the receipt of said one hundred and twenty-five dollars for plaintiff's use or benefit; denied that plaintiff paid over to defendant said sum, or any sum, for or in consideration of which the defendant promised to sell or deliver to plaintiff any horse; denied in effect the breach of any promise made by him to sell and deliver to plaintiff the horse mentioned in the complaint, or any horse. But averred that he sold and delivered to plaintiff a horse, at the time alleged in the complaint, for the agreed price of one hundred and twenty-five dollars; that said sale was without warranty of soundness or other warranty, and that said horse was worth the sum of one hundred and twenty-five dollars.

No reply was filed on the part of the respondent, and the case was tried upon the above issues. Judgment was rendered against the appellant in the Justice's Court for the amount claimed. He appealed therefrom to the said Circuit Court, where the case was tried anew, and the same result followed, and he then appealed to this court. Jury trials were had in both courts. The appellant claims that errors of law were committed in the trials of the case prejudicial to him, and upon which he relies for a reversal of the judgment. It appeared in evidence at the trial, from the respondent's own testimony, as shown by the bill of exceptions, that he negotiated with the appellant for the purchase of a horse, such as described in the complaint; that after stating to appellant the kind and style of horse he wanted to purchase, the appellant told him that he thought he had a horse that would suit him, and described him as possessing the qualities the respondent had mentioned as desirable. The latter asked him the price, and the former said one hundred and twenty-five dollars, saying at the same time, "That is not too much, is it?" To which the respondent said, "No; not if he is the horse you describe, and is sound." The appellant said he was; was all right; and that he would send the horse over to the respondent to look at and inspect. The next day a man came over from East Portland, where the appel-

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lant resided, and where he was engaged in the livery business, to Vancouver Barracks, where the respondent was stationed, he being an officer at the post there, and brought with him the horse. The man introduced himself to respondent as "Look," whom appellant had sent over with the horse about which respondent had talked with appellant the day before. Respondent looked at the horse, which looked all right, and apparently answered respondent's purpose. He then drove him up and down the Barracks Avenue, and he appeared to go all right; that respondent noticed when he stopped that the knee advanced one foot ahead of the other—a forward foot—and called Look's attention to it. Look said it was only the position in which the horse stopped, and assured respondent that he was all right, perfectly sound, and without a blemish. Respondent told Look if the horse were not sound he did not want him, as he wanted a horse his wife could drive at once, and he would not drive a lame horse.

After some further talk of the same kind respondent told Look to tell appellant that he would take the horse. Look then left with the horse. The next day, which was July 30, 1886, the appellant came over with the horse. Respondent called his attention to the peculiarity of the horse advancing one foot, and the appellant said, "Yes, I meant to tell you that I took a small piece of gravel from his hoof." Respondent then said to him that if there was anything the matter with the horse he did not want him; that he wanted a horse that his wife could drive at once. The appellant assured him that the horse was all right; that it would not interfere with his driving a particle; that he was sound, and respondent would so find him. The horse did not appear then to be lame; appeared to drive all right. Respondent then told appellant to take the horse to the government stable, pointed it out, and gave him a check for one hundred and twenty-five dollars; that he considered at the time that he "owned the horse, and so regarded himself."

The respondent's counsel then proposed to prove certain matters which took place subsequent to the delivery of the horse, and giving of the check in payment thereof, which took

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place between respondent and said Look, and also with the appellant, to which the appellant's counsel objected as incompetent and immaterial, and because there was no evidence tending to prove that Look had authority to act for appellant after the delivery of the horse. The court overruled the objection, and said counsel excepted to the ruling. This presents the main question in the case. The appellant's counsel insist, that in view of the issue tendered by the complaint, the respondent had no right to show any subsequent arrangement between the parties, after the completion of the sale of the horse, as a ground of appellant's liability; that such matter must be alleged in order to be admissible in proof. It has been held in a great majority of the States that the mode of pleading heretofore known as "common counts" may still be employed, notwithstanding the adoption of the reformed system. In this State, however, the right is denied. This court, in *Bowen v. Emmerson*, 3 Or. 452, held that the use of the general counts in assumpsit was wholly inconsistent with the theory of the Civil Code. The principle of that decision would not prevent a plaintiff from maintaining an action for money had and received for his use, provided he allege facts in his complaint sufficient to show that the money paid to the defendant justly and equitably belonged to the plaintiff. Proof that the money legally became the property of the defendant would defeat the action, unless the plaintiff was able to establish that, through some subsequent arrangement, the money was still his.

In order, however, to enable himself to make such proof, the fact would have to be alleged. He could as well have neglected to allege any facts under which the money was paid, as to have neglected to allege those he was permitted to prove against the appellant's objection, and which, he claims, established his right to the money. It would, so far as I am able to see, have been as tolerable for the respondent to have gone into court and only have alleged the payment of the one hundred and twenty-five dollars to and for his use and benefit, and have undertaken to establish it by the evidence in the case, as to have alleged what he did. He alleged sufficient, no doubt, to establish a

prima facie case; but when it appeared that the money was paid for the horse, which was accepted and received by the respondent, and became his property, his case, as made in his complaint, was overthrown, and he was compelled to go outside of what he had alleged in order to sustain it. The Code will not permit this, whatever may have been the rule at common law. This conclusion may be thought to be a very slight ground upon which to reverse a judgment that has been rendered upon the verdict of a jury, but the point comes squarely before the court, and however much we might dislike to dispose of the case in that way, yet I do not see how such a result could be avoided if there were no other questions in the case.

There is, however, another matter to be considered. It appears that after the respondent rested his case, the appellant's counsel moved for a nonsuit, which motion having been overruled by the court, an exception was saved to the ruling, and which, to my mind, presents a more serious question than the former. The testimony upon the part of the respondent that was objected to, and upon which he bases his right to recover in the action, shows that the horse purchased, which is described as a brown horse, named "Major," became, soon after the purchase, so lame that he could not be used; that the respondent thereupon complained to the appellant on account of his condition. The appellant advised that the respondent turn the horse out, assuring him that the animal would soon be all right. The respondent objected to it, as he had purchased him for immediate use, and asked the appellant to let him have a horse to drive temporarily, to which the latter consented, and sent the respondent over another horse named "Doc"; but "Doc" proved to be lame also, and the respondent returned him. After that time, and about the last of August or forepart of September, respondent saw appellant at his stable in East Portland, and told him again about "Major's" condition; appellant again advised turning him out, but the respondent would not consent to it, and finally said to the appellant that he was dissatisfied with the horse and asked him what he was going to do about it, to which the appellant replied, "Well, I guess I will have to get

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you another horse." Respondent said, "All right," and appellant then said, "I will send a man over to you." That within a day or two, Look, the man who first brought "Major" over, came to respondent at the Barracks, and said to him: "Mr. Beck says you are dissatisfied with the brown horse," referring to "Major," "and I came over to see you about it." Respondent explained to Look the trouble, and the latter, who it appears is a professional horse trader, said he knew just the horse respondent wanted, and thought he "could trade for such a horse, and get him one that suited." Respondent told him all right, so that he got a horse he had bargained for and paid for. He also said, "Suppose if you take 'Major' away you bring me a horse that don't suit?" Look said, "I will keep at it until you are suited." Respondent said, "All right," and Look took the brown horse off, stating that he would be back in two or three days. He also said, in the course of the talk, that he knew of a four-year-old colt he thought he could get, but that respondent might have to pay fifty dollars more; the latter said "that was all right, if the colt suited."

Look did not come back for some time, and then did not bring a horse that suited, though as I understand the evidence, he traded off the brown horse. Afterwards he brought back another which did not answer, and subsequently another, but not such a one as respondent would accept. Finally he wrote respondent that he had another horse for him, but would not deliver it unless the latter would pay him fifty dollars for the trouble he had been to. This seems to have stopped affairs between respondent and Look, and the former renewed his complaint to the appellant, claiming that he had been acting with Look as appellant's agent. The appellant denied that Look was his agent, and insisted that he had nothing to do with Look's trading off "Major," or trading for the subsequent horses. At one of the times when Look took over a horse for respondent he told him that it could be sold for a hundred dollars, but could not be paid for until the spring following, to which respondent said, "If Beck will sign the note, all right." Look said, "Beck will not do that." After some negotiation and correspondence

between the parties, respondent and appellant, and their failure to adjust the matter, this action was commenced.

• There is a serious doubt whether the evidence tended to show that Look acted as agent for Beck in his efforts to get the respondent a horse that would suit him, but if he did, I cannot see how the evidence was admissible under the pleadings, or justified the conclusion of a rescission of the contract of the sale of the horse "Major." It is said by Chitty, in his work on Pleading, that "where a special contract is still *open*, and has not been rescinded by *mutual consent*, it is necessary to declare specially; as if a horse, etc., be sold with a warranty of soundness, although it be unsound, and the purchaser *immediately* offers to return it, he cannot recover back the price on the count for money had and received, if the vendor refuse to receive back the horse; for the warranty can only be tried upon a special count, unless there was an express stipulation to take back, or unless there was actual fraud; and in such case the count for money had and received is not maintainable, although upon the horse being tendered to the seller he stated that if the horse be unsound, he will take it back and return the money; provided, he denies the unsoundness, and does not take back the horse. If, however, either by virtue of an express stipulation in the original contract, the plaintiff was in a certain event entitled to rescind it, or it has been put an end to by the agreement of both parties, the common count may be supported to recover money paid on the contract. (1 Chitty on Pleading, p. 355.)

The same principle was maintained in *Dickenson v. Lane*, 107 Mass. 548. That was an action to recover back money paid for a horse sold with warranty. The plaintiff at the trial introduced evidence tending to show that the horse was returned by him to defendant; that after the return of the horse the defendant asked the plaintiff why he had returned him, to which the plaintiff replied that the horse was unsound, and demanded the return of his money paid for it; and that the defendant promised to send the money to the plaintiff the next day, but failed to do so. Ames, J., in delivering the opinion of the court, said that "the plaintiff's declaration charges that the defendant warranted the horse,

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and that the warranty was broken. He rests his claim to recover back the purchase money upon no other ground. Upon the case presented by the declaration, if there was no warranty or no breach, the money was properly paid, and in equity and good conscience belonged to the defendant. The ruling which the plaintiff requested the court to make was substantially that he should be excused from proving the vital element of his case, as he had seen fit to present it for trial. A subsequent agreement to rescind the original contract and to return the money was an entirely different matter, of which the declaration gave no intimation, and plainly was not allowable as a ground of claim in this action without amendment."

The correctness of the rule is unquestionable, and is sustained by the great majority of the modern authorities. Unless, therefore, the respondent's proof establishes that the original contract between the respondent and appellant was put an end to by the agreement of both parties, no cause of action was made out; but it does not do that. It nowhere appears that appellant agreed to take the horse "Major" back and cancel the sale, nor that the respondent desired him to do so. The latter's complaint was that "Major," on account of his lameness, did not answer his purpose, nor was he such a horse as he bargained for, and the former replied: "Well, guess I will have to get you another horse; I will send a man over to you." The respondent, according to his own testimony, assented to this. Then Look appeared again on the scene, not for the purpose of taking the brown horse back to appellant in rescission of the contract of sale, but evidently to assist the respondent in swapping off the horse and securing in exchange one that would answer the respondent's purpose. There is nothing in the evidence I can discover which indicates that the horse was to be delivered back to the appellant and accepted by him as his own property. It is unfortunate for the parties and the community that they have got the matter into the awkward fix it is in. It results from indecision. The respondent should have said to the appellant, when it was found that the horse "Major" continued lame, "Either take him back and pay back the money, or pay the difference between the value of the horse

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as he is, and the value he would have had, if he had been as represented." Instead of adopting that course, however, he consented to Look's going into a scheme of swapping, apparently relying upon his assurance that he would "keep at it until respondent was satisfied." Look being an agent of the appellant did not change the character of the affair. There was no agreement between respondent and Look that the sale of the brown horse to the former should be rescinded, nor were the jury justified by the evidence in finding any such fact.

The finding of a jury upon a question of fact may be conclusive, but there must be proof of a cause sufficient to be submitted to them to render it so. A verdict, without evidence tending to prove the fact found by it, is against law. The trial by jury is an excellent institution when controlled by the rules of law; but if it were to become a mere arbitration, it would be pernicious. I am of the opinion that the respondent was not entitled to prove a rescission of the contract of sale of the horse, without alleging it in his pleadings. Also, that the testimony admitted for that purpose was not sufficient to be submitted to the jury, and that the plaintiff in the action should have been nonsuited upon motion of the defendant's counsel. The case will therefore have to be remanded to the Circuit Court, with directions to enter a judgment of nonsuit against the plaintiff therein. If the Circuit Court would have authority to allow the pleadings to be amended, I should be in favor of remanding the cause for a new trial, but as it is in that court upon appeal from Justice's Court, I apprehend the former court would not have such right.

Opinion of the Court—Strahan, J.

[Filed January 8, 1888.]

**STATE OF OREGON, RESPONDENT, v. CHARLES RYAN,
APPELLANT.**

ORIGINAL LAW—INDICTMENT.—A party indicted for the crime of burglary cannot be convicted of the crime of an assault with the intent to commit rape.

INDICTMENT—ASSAULT WITH THE INTENT TO COMMIT RAPE.—An indictment for the crime of burglary which charges that the defendant broke and entered the house with the intent to commit rape, and having so entered said house did then and there commit an assault upon one E. M. M., then lawfully in said house, did not charge an assault on E. M. M. with the intent to commit rape.

BURGLARY—NOT A CRIME CONSISTING OF DIFFERENT DEGREES.—Burglary is not a crime consisting of different degrees, like the various degrees of criminal homicide and the like; nor is an assault with intent to commit rape one of the "degrees" of such crime.

INDICTMENT—EFFECT OF ALLEGATIONS THEREIN.—The allegations in said indictment, after the charge of breaking and entering, were inserted to show the unlawful intent with which such breaking and entering was done, and can perform no other office therein than to characterize the intent.

APPEAL from Linn County. **Reversed.**

W. R. Bilyeu, for Appellant.

George W. Belt, District Attorney, for the State.

STRAHAN, J.—The defendant was indicted for the crime of burglary by the grand jury of Linn County, and was convicted of *an assault with the intent to commit rape*, and sentenced to imprisonment in the penitentiary for one year, from which judgment this appeal is taken. The indictment is as follows:—

"In the Circuit Court of the State of Oregon, for the County of Linn.

"The State of Oregon, Plaintiff, v. Charles Ryan, Defendant.

"Charles Ryan is accused by the grand jury of the county of Linn, in the State of Oregon, by this indictment, of the crime of burglary, committed as follows: The said Charles Ryan, on the eighth day of November, A. D. 1887, in the county of Linn, and State of Oregon, then and there being, did then and there feloniously and burglariously break and enter in the nighttime a dwelling-house, in which there was at that time a human being, namely, Ella M. Mack, with the intent to commit rape

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therein, by forcibly breaking an outer door of said dwelling-house; and the said Charles Ryan, having so entered said dwelling-house with such intent, did then and there commit an assault upon Ella M. Mack, a person lawfully then in such house. Contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

"Dated at Albany, in the county of Linn, and State of Oregon, the fifteenth day of November, A. D. 1887.

"GEO. W. BELT, District Attorney."

And the jury returned the following verdict:—

"*The State of Oregon v. Charles Ryan.*

"We, the jury in the above-entitled cause, find the defendant guilty of assault with intent to commit rape.

"Foreman, WILLIAM RALSTON."

Appellant's counsel has suggested and argued several objections presented by this record, which I will now consider.

It is claimed that the indictment being for the crime of burglary, the defendant cannot be convicted of any other offense; that this is not a case within section 1382 of Hill's Code, where an indictment is for a crime consisted of different degrees, and that the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime of any such inferior degree thereof. Under our statute, burglary is not a crime consisting of different degrees. It is wholly unlike the various degrees of criminal homicide, and the different degrees of criminality which may be involved in the single charge of an assault and the like. This theory is so much at variance with every preconceived idea of criminal procedure that it requires no particular examination. An assault with the intent to commit rape is not one of the degrees of burglary. (*State v. Ridley*, 48 Iowa, 370.)

But the district attorney further claimed that this indictment contained a charge of two crimes, namely, burglary, and also an assault with the intent to commit rape, and the defendant having failed to move to set the indictment aside, or demur to it for

Points decided.

this reason, the objection was waived. But this theory is not supported by the record, nor is it admitted that this result would follow if it were. On the contrary, the indictment on its face purports to be for the crime of burglary, and all the other matter therein after the charge of breaking and entering is to show the unlawful intent with which the defendant broke and entered the house. It is set out with unnecessary prolixity, but it can perform no other office than to characterize the intent with which he broke and entered. But waiving these objections for a moment, and considering the facts alleged in this part of the indictment separately, they are wholly insufficient to constitute the crime of an assault with the intent to commit rape. The indictment charges that the defendant entered the house with the intent to commit rape therein, and having so entered said dwelling-house with such intent, did then and there commit an assault upon Ella M. Mack, a person lawfully therein. The essential facts necessary to constitute this crime are wholly wanting, and there appear no grounds whatever upon which this conviction can be sustained. In effect, this defendant has been convicted of a most outrageous crime, and is now confined in the penitentiary therefor, without any indictment having been preferred against him for that crime, or without having been put upon his trial therefor.

The judgment of the court below will therefore be reversed, and a new trial awarded.

[Filed January 4, 1888.]

T. J. BLACK, APPELLANT, v. NANCY SIPPY, RESPONDENT.

MARRIED WOMEN—LIABILITY OF, FOR FAMILY EXPENSES.—The wife is liable for goods for family use, although sold to the husband on his individual credit, under section 10 of the Session Laws of 1870, and the husband may change the form of indebtedness by giving his note for the account, without releasing her. Nor is the remedy against the wife extinguished by the assignment of such note.

APPEAL from Linn County. Reversed.

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19 234
22 253
16* 418
23* 962
29* 619

15 574
27 218
27 256
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15 574
236 272

15 574
42 486

15 574
44 456

Opinion of the Court—Lord, C. J.

Weatherford & Blackburn, for Appellant.

Hewitt & Bryant, and *N. B. Humphreys*, for Respondent.

LORD, C. J.—This was an action to recover money for goods and merchandise sold and delivered, and the liability of the defendant is founded on section 10 of the Act of October 21, 1878. (Sess. Laws, 1878, p. 94.) A demurrer was interposed to the complaint, on the ground that the facts stated did not constitute a cause of action, which being sustained, and judgment rendered thereon, the plaintiff has appealed to this court. The material facts, without detail, which the demurrer admits, are, that the assignors of the plaintiff at the time alleged, and at the special instance and request of the defendant and John Sippy, her husband, sold and delivered to John Sippy, goods, wares, and merchandise, as shown by an itemized exhibit, some to the husband and some to the wife; that all of said goods and merchandise were purchased and received for the use of the family of the said defendant and John Sippy, and that they were necessities, and were used as such by them and their family; that the goods and wares so sold and delivered were charged to the husband, John Sippy, and that on a statement of accounts, a certain sum was found due the assignors of the plaintiff; and as evidence of the amount due and owing, and not as a payment, the said John Sippy executed and delivered his note to them; that the said note was assigned to this plaintiff, and that he is now the holder thereof, etc. Section 10 of the act referred to provides: "The expenses of the family and the education of the children are chargeable on the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." This section is identical with section 2214, Code of Iowa, 1873. As it has already been decided under section 10 that a wife is liable for goods for family use, although sold to the husband on his individual credit (*Watkins v. Mason*, 11 Or. 72; following *Smedley v. Felt*, 41 Iowa, 588, of the State whence this provision of the statute was taken), it will not be necessary to notice objections falling within the scope of this decision. Our attention, therefore, will be confined

Opinion of the Court—Lord, C. J.

to the other objections remaining, urged in support of the demurrer, viz.: (1) That the acceptance of the note of John Sippy for the goods was payment of the indebtedness on account, or released the defendant, if originally liable on such account; and (2) that by the assignment or transfer of the note, the remedy against the defendant was lost or extinguished.

Nothing is better settled than that accepting a note is not payment of an account, nor is accepting one note in renewal of another payment of the old note, unless there is an agreement that the note should be accepted in payment. In *The Kimball*, 3 Wall. 45, Mr. Justice Field said: "By the general law as well of England as of the United States, a promissory note does not discharge the debt for which it was given, unless such be the express agreement of the parties. It only operates to extend until its maturity the period of the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said, as long ago as the time of Lord Holt, that 'a bill shall never go in discharge of a precedent debt, except it be a part of the contract that it should be so.'" As the acceptance of the note was not payment, and as already decided (*Watkins v. Mason, supra*), the defendant would have been liable on the account, why should a change in the form of the indebtedness from an account to a note operate to release or discharge her, when it has no such effect as to the husband?

The manifest object of this provision of the statute is to charge the property of the husband and wife, so far as necessary, with the support of the family. In furtherance of this object, they may be sued jointly or separately for necessities incurred as a family expense, and the property of both or either of them rendered liable therefor; and if they are thus liable on account for family expenses charged to the husband, and the taking of the note does not extinguish the indebtedness or operate as payment without an express agreement, it cannot operate to release either of them. The mere changing the form of the indebtedness does not affect the liability of the parties, or operate so

unequally as to release one and hold the other in the absence of some agreement to that effect.

In *Lawrence v. Sinnamon*, 24 Iowa, 80, it was held that in the absence of fraud and collusion between the husband and the creditors, the acts, agreements, and promises of the husband in relation to the family expenses, etc., are binding upon the wife, without any express consent or action on her part. The husband may change the form of indebtedness, as by giving his note for the account without releasing her. And that the husband may make such contracts for necessities, without using the name of the wife, and may give his individual note therefor, for which the property of the wife will be liable, was expressly affirmed in *Smedley v. Felt*, 41 Iowa, 590. The giving of the note is often a matter of accommodation, and for an extension of time for payment, so that the wife is entitled to whatever advantage accrues thereby, and there is no reason why, equally with the husband, she should not be held to the same remedies.

It is next objected that the transfer of the note discharged the defendant from liability. But this question has also been decided adversely to that assumption. In *Frost v. Parker*, 65 Iowa, 180, where the husband gave his note for the goods, which was subsequently put into a judgment against him individually, it was held, in an action in chancery to subject the property of the wife to the payment of the judgment, that it was liable. One of the objections raised in that case was that no assignment of the claim against the wife was shown. The court thus answered this objection: "The action cannot be defeated on the ground that no assignment of the claim against the wife is shown. The wife was not a party to the original contract or the note. The evidence of the debt was changed from an oral contract to a note, and from the note to the judgment. The debt all the time continued the same. The debt was continually enforceable against the wife's property. Her liability followed the debt. An assignment of the claim as against her, therefore, is not necessary to authorize the plaintiff to bring this action." In *Phillips v. Kerby*, 34 N. W. Rep. 855, it was held that where the husband gives his promissory note for goods purchased and used as family supplies,

Points decided.

the cause of action is not barred against the wife until action upon the note is barred as against the husband, and that this is true where the note has been reduced to judgment against the husband.

As a result of the reasoning of these authorities under an identical provision, the wife is liable for necessities incurred as a family expense, although originally charged to the husband, and for which he had given his note; nor will the transfer of the note discharge her from such liability.

It was error to sustain the demurrer, and the judgment must be reversed.

STRAHAN, J.—I yield an assent to this decision, solely on the principle of *stare decisis*. When the legislature used the terms “chargeable upon the property,” they were using language the signification of which had received a judicial construction, and was fixed in equity, and it ought to be held, therefore, that such language was used in that sense. The effect of such construction would be to create a new remedy in equity against the property of both husband and wife for the necessities of the family; but Iowa, whence this statute was taken, had given it a different construction prior to its adoption here, which I suppose upon well-settled principles we are compelled to follow.

[Filed January 5, 1888.]

S. R. HAMMER, APPELLANT, v. POLK COUNTY, RESPONDENT.

APPEAL FROM ASSESSMENT OF DAMAGES—WHEN IT LIES.—Under section 4069 of Hill's Code, an appeal lies to the Circuit Court from the assessment of damages, within twenty days after the report is adopted by the County Court.

ORDER OF COUNTY COURT—EFFECT THEREOF.—The legal effect of the order of the County Court adopting the report, but refusing to establish the road as a public highway, unless the petitioners first paid the damages, was to declare in effect that such road was not of sufficient public utility to require the county to pay such damages.

REASONABLE TIME—COMPLIANCE BY PETITIONERS.—After the making of such order the petitioners had a reasonable time within which to comply, but the appellant's right of appeal was in no way dependent thereon.

15	578
43	598
43	540
15	578
48	268
48	269
48	270

APPEAL from Polk County. Reversed.

Warren Truitt, W. M. Kaiser, and Seth R. Hammer, for Appellant.

G. W. Belt, J. J. Daly, and N. L. Butler, for Respondent.

STRAHAN, J.—On the 5th of January, 1887, Orlando Alderman and others duly filed their petition in the County Court of Polk County for the location of a certain county road. Viewers were thereupon appointed, who caused said road to be surveyed and marked out, and reported in favor of the location and establishment thereof. Within the time allowed by law, and before the establishment of said road, the appellant, as administrator of the estate of Sarah L. Stipp, filed a petition for damages caused by the location of said proposed road through the lands of his intestate, and upon said petition the court appointed three disinterested householders to examine the premises, and report how much less valuable they would be rendered by reason of the location of said proposed road. On the eighth day of March, 1887, they filed their report, by which they found no damage to the lands of appellant's intestate; but that the land of said estate, through which said road was proposed to be located, was of the value of fifteen dollars per acre. On the ninth day of March, 1887, the County Court of Polk County entered an order, in effect, finding that the damages to the estate of Sarah L. Stipp, or her heirs, was forty-five dollars, and to H. Holden forty-five dollars, making total damages ninety dollars; and the court considering thereof, it was ordered that said report be accepted, and in all things approved, and that when the petitioners pay into the court the sum of ninety dollars as assessed, said road shall be declared a public highway, and fully established as such. Within twenty days from the approval of this report the appellant appealed therefrom, and from the order approving same, to the Circuit Court of Polk County, and on the eleventh day of May, 1887, said court, on motion of the respondent, dismissed said appeal, "for the reason that said court had no jurisdiction of the subject-matter of said pretended

Opinion of the Court—Strahan, J.

appeal," and gave final judgment in favor of respondent, from which judgment this appeal is taken. Upon the argument here, counsel for the respondent claimed that the appeal from the County Court was prematurely brought; that an appeal in such case would only lie within twenty days after an order had been made, locating and establishing said road. The question depends upon the construction of section 4069 of Hill's Code, which is as follows:—

"Section 4069. Any complainant who may conceive himself aggrieved by the assessment of damages as prescribed by the last two sections, may, within twenty days after such report is adopted by the court, appeal therefrom to the Circuit Court of the proper county. Such appeal shall be taken to the Circuit Court in the same manner as appeals from justices of the peace, and if the appellant shall fail to recover a judgment more favorable than the report appealed from, he shall pay all costs of the appeal."

This section gives the right of appeal to the party "who may conceive himself aggrieved by the assessment of damages, to be exercised within twenty days after such *report is adopted*." The appeal is practically from the assessment of damages, and its design was to furnish an aggrieved party with a cheap, easy, and expeditious remedy in case the estimate of the viewers proved unsatisfactory to him. The legal effect of the order made by the County Court of Polk County was to declare that the proposed road was not of sufficient importance to the public to cause the damages to be paid by the county, and to give notice to the petitioners that the court would refuse to establish the road as a public highway, unless the damages should be paid by them. This order the court was authorized to make by section 4068 of Hill's Code (*Thurman v. Emmerson*, 4 Bibb, 279), and within a reasonable time the petitioners had the right to comply with it, and in each case appeal lies. (*McNichols v. Wilson*, 12 Iowa, 385.)

The court might have refused to establish the road as a public highway as long as the proceedings to assess damages were pending on appeal; but the record discloses that pending the appeal

Points decided.

the petitioners paid the damages assessed, and the County Court established the road. But these proceedings in no way affected appellant's right to prosecute his appeal, and to have a jury pass upon the amount of his damages.

The judgment dismissing the appeal will be reversed, and the cause remanded to the court below for trial, or such other proceedings as may be proper.

[Filed January 6, 1888.]

BENJAMIN TUCKER, RESPONDENT, v. THE SALEM FLOURING MILLS COMPANY ET AL., APPELLANTS.

PLEADINGS—PROOF—VARIANCE.—Evidence that the appellants wrongfully caused the waters of Santiam River to flow into an artificial channel, constructed twenty years before the alleged wrongful act, and which had become the *channel* of "Mill Creek," is sufficient to sustain a charge in the complaint of having caused the waters of the Santiam River to flow "into Mill Creek," thereby damaging plaintiff, etc.

PRACTICE—BILL OF EXCEPTIONS.—It is not proper practice to bring before the court, and the court will not examine, a mass of testimony, in order to find conclusions of fact therefrom. The bill of exceptions should contain a statement that evidence was given *tending* to prove the fact claimed, and show that proper instructions had been asked, or the jury had made a special finding of the facts, before this court can be required to consider it.

INSTRUCTIONS—EXCEPTIONS TO.—Where the charge consisted of several pages of type-writing matter, and appended to it was a note to the effect that counsel excepted to that portion enclosed in italics, *held*, that this might answer as a memorandum of the parts of the charge excepted to, but was not sufficient under section 230 of the Civil Code as a statement of the exceptions.

WATER-COURSE—CHANNELS.—An instruction that if the jury found that the waters of Mill Creek flowed through the same slough, ditch, or channel on the lands of plaintiff during the two years preceding the commencement of the action that they had been running in for twenty years before that time, then such slough, ditch, or channel was for the purposes of the action the channel of Mill Creek, and its banks the banks of Mill Creek, within the meaning of a complaint, alleging that the defendant had overflowed said Mill Creek to the damage of plaintiff's premises, coupled with an instruction that if one diverts the waters of a stream by artificial means, he is bound to take care of the same until it returns to its natural bed. *Held*, to be correct.

APPEAL from Marion County. **Affirmed.**

N. B. Knight, and *George H. Burnett*, for Appellant, The Salem Flouring Mills Co.

15	581
22	498
16*	426
30*	311

Opinion of the Court—Thayer, J.

The complaint charges damage by overflowing the banks of Mill Creek; but the court below permitted testimony against the objection of the defendants, that the land of plaintiff was overflowed by a certain slough.

We claim that this is not merely a variance, but a failure of proof fatal to plaintiff's case. (*Hill v. Supervisors*, 10 Ohio St. 621; *Ashley v. Walcott*, 11 Cush. 192; *Dickenson v. Worcester*, 7 Allen, 19; *Pickett v. Condon*, 18 Md. 412; *Brown v. Woodworth*, 5 Barb. 550; *Wilber v. Brown*, 3 Denio, 356; *Griffith v. Jenkins*, 2 Allen, 589; *Waldheir v. R. R. Co.* 71 Mo. 514; *Buffington v. A. & P. R. R. Co.* 64 Mo. 246; *Parker v. R. & S. R. R. Co.* 16 Barb. 315; *Graves v. Severns*, 40 Vt. 636; *Bernhard v. Insurance Co.* 40 Iowa, 442; *Thatcher v. Heisey*, 21 Ohio St. 668; *Gossam v. Badgett*, 6 Bush, 97; *Kelsey v. Western*, 2 Comst. 506; *City of Salem Co. v. S. F. M. Co.* 12 Or. 374.)

Tilmon Ford, and *W. M. Kaiser*, for City of Salem Co., Appellant.

Plaintiff having alleged a joint tort must prove a joint trespass. (*Dahms v. Sears*, 13 Or. 64, 65; *Cooper v. Blair*, 14 Or. 255.)

Ramsey & Bingham, for Respondent, cite 13 Or. 28.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Marion, recovered by the respondent against the appellants in an action at law. The action was for damages alleged to have been done by the appellants to the lands of the respondent, by causing a large amount of water to flow from the Santiam River, in said county of Marion, into Mill Creek, a small stream of water which flows through said lands, and thereby causing them to become flooded.

The case has been here before, and after considering it, we concluded that the judgment appealed from then ought to be affirmed, and delivered an opinion to that effect, which will be found in 13 Or. 28. Afterwards, however, a rehearing was granted, and the court, entertaining some doubts upon some of

the questions presented, saw fit to change its decision and send the case back for a new trial. The action of the court in that particular was not in consequence of any distrust entertained as to the correctness of the general view expressed in the opinion referred to, but through an apprehension that an error might have been committed upon the trial of the case prejudicial to the rights of the appellants. The bill of exceptions sent here with the transcript was vague and uncertain, upon some material points in the case, which occasioned the embarrassment.

It appears now that a new trial has been had, and the result been similar to the former one. The verdict of the jury, however, is less by two hundred dollars than that given upon the former trial. The main points in the case presented at this time were considered when it was here before, and it is unnecessary to reconsider them, but the facts connected therewith are more fully shown.

It now appears that the diversion of the water of Mill Creek by Turner, which is referred to in said opinion, occurred some twenty-five years ago, and about twenty years before the appellants are charged in the complaint with having caused the water to flow from the Santiam River into Mill Creek; during all of which time the channel devised and constructed by Turner has, at that point, been the channel of said creek. But the appellants' counsel still insist that there is a marked distinction between the creek proper and the artificial channel, and that the allegations in the complaint, "that defendants by wrongfully causing said water to flow into said Mill Creek have, during the two years last past, wrongfully caused said Mill Creek to overflow its banks on plaintiff's land, and to overflow and flood fifty-five acres," etc., necessarily refers to the old creek channel, and that evidence that the water overflowed the new channel, would not sustain said allegations; and consequently there had been a failure of proof of the complaint.

This court will not adopt any such refined view as that. It would, under any circumstances of the case, only look to the main fact, the alleged wrongfully causing the large amount of water to flow from the said river into the said creek. If the

Opinion of the Court—Thayer, J.

appellants did that, and it was wrongful, they are liable for the damages occasioned thereby, whether the water overflowed the banks of the old creek, and went onto the respondent's land, or overflowed the new channel, and went onto his land. Proof of the principal act and its consequences are sufficient, whether the latter resulted from the former in the particular manner alleged, or in some other manner. It is immaterial in what way the water got onto the respondent's land, if it got there through the wrongful act of the appellants. There might be a wide variance between the allegations and the proof as to the course of the water in running onto the lands in question, and not be material at all. Did the appellants do wrong in turning from the Santiam River into Mill Creek the amount of water they turned in during the time referred to in the complaint, is the question to be considered. They had no right to turn in any more water than would flow in the channel of the creek. If they turned in a supply of water that the banks would not hold, and it escaped and ran upon the lands of an adjoining proprietor, they would be liable for any damages occasioned thereby. Whether they did that or not was a question for the jury.

Their counsel claimed upon the argument that if the channel of the creek had not been interfered with by said Turner, and the water been allowed to flow down its channel as it formerly did, it would not have overflowed the banks of the creek, or have injured the respondent. They claimed that Turner had put a dam across the creek, turned the water out into a slough and ditch, which had not the capacity of the old channel, and in consequence thereof, the overflowage and flooding complained of occurred, and they insist that the evidence shows that fact. Whether the evidence sent up here, in what the counsel are pleased to term a bill of exceptions, will warrant such a conclusion or not I shall never know, for I never intend to look into it to ascertain whether such is the fact or not. If counsel desire a review of such questions they must prepare a bill of exceptions as provided in the Civil Code of the State. They have no right to throw together in a mass all the testimony given in the case,

as taken down and extended by a short-hand reporter, as has been done in this case, and bring it here and require this court to examine it, and find its conclusions of fact therefrom. No such practice should be tolerated by an appellate tribunal in a proceeding to review errors of law. Had the document termed the bill of exceptions contained a statement that the appellants gave evidence at the trial tending to prove the fact claimed to exist, and it had appeared therefrom that the trial court was requested to instruct the jury that if they found such fact they would find for the appellants, or the jury under directions of the court had made a special finding of such fact, we would have considered it.

But counsel must learn that this court cannot be converted into a trial court in law actions. Many questions of law may involve an examination of testimony given in a case, such as the overruling of a motion for a nonsuit, but ordinarily, an exception only requires a statement of a small portion of the evidence in order to explain it. But the fault here referred to is not that the objection, constituting the exception, is stated, with more of the evidence than is necessary to explain it; the fact is, it is not stated at all. The proceedings had at the trial, and the evidence taken, are marshaled and sent here for this court to examine and consider the various exceptions indicated therein.

Several points were discussed relative to the charge of the court to the jury. Upon an examination of the transcript, I find that the whole charge is there set out. It consists of eight pages of ordinary type-writing. Appended to it is the following note, viz.: "At the conclusion of the charge, Mr. ———, counsel for defendants, called the attention of the court to those portions of the charge enclosed in brackets, and, after having the same read to the court by the reporter, thereupon stated that they excepted to all said portions so read, and to which the attention of the court was so called, and to the whole, and each and every part thereof."

This might answer as a memorandum of the parts of the charge counsel excepted to, but they are in no suitable shape to be presented here. The statute clearly intends that a statement of the

Opinion of the Court—Thayer, J.

exceptions shall be made up, settled and allowed, signed by the judge and filed with the clerk, and thereafter it is deemed and taken as a part of the record of the cause. (Civ. Code, § 230.) No such labor-saving shift as that which seems to have been devised and adopted in this case can be countenanced. It would lead to so loose a practice that counsel could not know, nor courts determine, what questions were involved, or were to be decided.

I have examined the instructions of the court to the jury herein, and regard them as very favorable to the appellants. The main one excepted to, so far as indicated by the "brackets," is to the effect that if the jury found from the testimony that the waters of Mill Creek flowed through the same slough, ditch, or channel, on the lands of the plaintiff during the two years complained of that they had been running in for twenty years before that time, then that such slough, ditch, or channel was, for the purpose of the action, the channel of Mill Creek, and its banks were the banks of Mill Creek, within the meaning of the complaint. That instruction was clearly correct. The latter channel, after such a lapse of time, could consistently be termed "Mill Creek." But it is immaterial whether it could be so termed or not. If the pleader had intended to refer to the banks of the old channel as those that were overflowed, and it turned out in the proof that it was the banks of the slough or ditch that were overflowed, it would have been an immaterial variance, as before suggested.

I have examined the various exceptions to the other portions of the charge, and those also to the refusal of the court to charge as requested by the appellants' counsel, and am of the opinion that none of them were well taken. Some question was made regarding the liability of one appellant for the act of the other, but it seems to have been properly determined at the trial. The jury evidently understood that a liability would not attach to one for the acts of the other, unless the former in some way sanctioned them, and that appellants were not jointly liable for torts committed by them severally. There were no difficult questions of law in the case. The right of the appellants to use the water of the Santiam River, by turning it into Mill Creek and thereby

increasing the volume of water in the latter stream, was conceded. They and their predecessors had been doing that for more than twenty years prior to the time of the overflowage complained of. There was a limit, of course, to the quantity of water they had a right to turn into the creek.

The complaint of the respondent, and claim for damages, proceeded upon the grounds that, during the two years immediately prior to the filing of the complaint, they had turned in an unusual amount, that they had, in effect, overcharged the capacity of the creek. That was the real issue in the case. The appellants' counsel seem to attach the blame on account of the overflow of respondent's land to Turner. He turned the water out of the creek in 1862 or 1863, and ran it around through his mill for milling purposes. He, in fact, changed the channel of the creek for some distance. Whether the capacity of that channel was equal to the capacity of the channel of the creek was a question for the jury. That condition of affairs existed evidently for about twenty years prior to the alleged grievance. It was a circumstance to be considered in the trial of the question involved in the case, and the court gave the appellants the benefit of it, so far as its attention was called to the fact. The court was not requested, as I can discover, to instruct the jury as to the effect of this diversion of the water in case they found that the channel established by Turner had less capacity than that of the creek, and that, it seems to me, was the material point. The court did instruct the jury that if the Santiam water running in Mill Creek was taken out of the creek by Turner, acting for himself, then he and his successors in interest were bound to take care of the water till it got back to the channel of Mill Creek; that the appellants could not be charged with damages caused by the diversion of the water from its natural channel by Turner; that the respondent must show that Turner, and those claiming under him, acted as the agents, or under the control of the appellants, or their predecessors, in order to establish the liability of the latter; that Turner had a right to take water from the natural channel of Mill Creek if he returned it again, but that he or his successors were alone

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responsible for the damage caused by the water while out of the natural channel; and that if the overflow complained of was caused by taking the water out of the natural channel of Mill Creek to bring it through Aumsville, the appellants were not liable, unless they caused the diversion of the water.

The court also instructed the jury, in substance, that if the amount of water taken from the Santiam River and turned into Mill Creek had been fixed, and a gauge set to regulate it, and the quantity used for twenty years had been in accordance with the amount so fixed and regulated, and it had been running through the channel established by Turner during that period of time, and it had sufficient capacity to carry away the amount of water up to the gauge, and that after the lapse of that time the appellants turned from the river into the creek more water than the amount fixed, and thereby caused the overflow, they would be liable for the damages caused by the extra amount of water, the amount above the gauge; but that they would not be liable for any damage caused by the water when not raised above the gauge; that in the latter case Turner alone would be liable.

The several instructions given by the court seem to have been fair and correct, in view of the facts and circumstances of the case, and I am unable to discover that any error was committed by the court in the trial of the case. The judgment should therefore be affirmed.

LORD, C. J. (stating the ground of his concurrence).—The court charged the jury in effect that if Turner had diverted the water from its natural channel in Mill Creek, he was bound to take care of it, and that he and his successors would be liable for any damage occasioned thereby before it was returned to the stream. It is, however, disclosed by the record that it was claimed by the plaintiff, and that there was some evidence tending to prove that there was a slough through which the waters of Mill Creek flowed, especially during seasons of high water, and which formed a part of, or was one of the beds of Mill Creek, and that by ditching, Turner had utilized it for milling purposes; that the defendants were using Mill Creek as a ditch

Points decided.

to convey water from the Santiam River to run their mills at Salem; that for more than twenty years the waters of Mill Creek, or at least a part thereof, flowed through this slough, which has been used and adopted by the defendants for the purpose of carrying water to their mills, and that the injury occurred by the wrongful act of the defendants in turning into Mill Creek from the Santiam an excess of water beyond its carrying capacity, etc. The court charged the jury in substance that if they found from the testimony that the waters of Mill Creek flowed through the slough, and had been doing so for more than twenty years, and used by the defendants for running their mills, that such slough was for the purposes of the case the channel of Mill Creek. There was no error in this, or anything that indicates that an artificial diversion of water makes a natural stream. On the contrary, the court expressly instructed the jury as to the effect of a diversion of the stream, and the liability for damages arising therefrom.

It was the fact, if they found that part of the waters of Mill Creek, not by artificial means, but naturally, flowed through this slough, and had done so for more than twenty years, etc., that for the purposes of the action its channel and banks were the banks of Mill Creek.

As there was no error of law upon these points, the verdict of the jury has passed the case out of our jurisdiction.

[Filed January 8, 1888.]

J. W. KREWSON ET AL., RESPONDENTS, v. J. S. PURDOM
ET AL., APPELLANTS.

15	589
383	330
15	589
40	83

WRITING—CONTENTS OF—WHEN PROVEN BY PAROL.—Before oral evidence can be received of the contents of a written instrument, it must be shown to the satisfaction of the trial court that an honest and diligent attempt had been made to obtain the writing itself, and that such attempt was unsuccessful, or proof be made that it had been destroyed.

INSTRUCTION.—The effect of such evidence, improperly admitted, is not cured by an instruction, "that if the contract was in writing, the jury was not at liberty to consider such oral evidence," there being no contention as to the fact of the contract being in writing.

Opinion of the Court—Thayer, J.

APPEAL—ERROR—EFFECT OF, WHEN NOT MATERIAL.—An error in the admission of evidence that does not effect an injury to the *material* rights of the appellant is not sufficient ground upon which to reverse a judgment.

APPEAL from Douglas County. Affirmed.

W. R. Willis, J. C. Fullerton, and J. W. Hamilton, for Respondents.

Cox, Smith & Teal, for Appellants.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Douglas. The respondents commenced an action in that court against the appellants, to recover damages for the alleged conversion of five hundred cords of wood, which had been cut and was in the woods where cut, claimed by respondents to belong to them. The case has been tried three times, and this is the third time it has been appealed to this court. The first appeal was taken by the now respondents. The case upon that appeal will be found decided in 11 Or. 266. The second time it was appealed by these appellants, and the decision therein will be found in 13 Or. 563. In the latter appeal the facts of the case are pretty fully set out in the opinion delivered.

The complaint in the action is in the usual form adopted in actions for the wrongful conversion of personal property. The answer contains denials of the material allegations of the complaint, and sets up as an affirmative defense, in effect, that the wood in controversy belonged to Herman and Robert Anlauf, partners, under the firm name of "Anlauf and Brothers," who were called "Aulauf Bros." in the former decisions referred to. The question as to whom the wood belonged to was the only issue, aside from the traverse. One Gotardi & Co. claimed to have cut the wood, and to have been the owners thereof, and all the title the respondents had to it they obtained from said last-named company. The appellants claimed that the wood was cut and owned by one "Maria and Company," from whom Anlauf Bros. claimed title. Said Anlauf Bros. became insolvent, and I believe their assignee sued out an attachment, which was

placed in the hands of the appellant Purdom, as sheriff of said county, for service, and that through his deputy, the appellant Slocum, he had levied upon the wood as the property of Maria & Co.

The two companies who originally claimed the wood were composed of a number of Italians, consisting in the main of the same persons. In consequence of the difficulty in identifying them, and of ascertaining the true relations of the members of each company to the other, the title to the wood was very much confused. Each company, I judge, got credit upon it, Gotardi & Co. from the respondents, and Maria & Co. from Anlauf Bros., and neither was probably sufficiently honest to tell the truth upon oath. The jury must have found that the wood belonged to Gotardi & Co. originally, and that they sold it to the respondents. The appellants' counsel rely upon only one point on the appeal, they claim that the evidence given by the respondents in regard to the sale of the wood by Gotardi & Co. to them was not the best evidence under the circumstances, and that the Circuit Court erred in not excluding it. It appears from the bill of exceptions that upon the trial of the case the respondents' counsel gave evidence tending to show that Gotardi & Co. contracted for the wood in the tree, cut it, and entered into a contract with the respondents to sell and deliver it to them for \$2.50 per cord, delivered upon the railroad track, less stumpage and hauling, if they did not do the hauling; and if they did do the hauling, then only less the stumpage. That respondents had in pursuance of the contract advanced a part of the purchase price. It further appeared from the said evidence, that after the making of the said contract, the parties went upon the ground where the wood had been cut, and where it then was, and that it was thereupon agreed that the delivery of the wood should be made by Gotardi & Co. to respondents there, and was accordingly delivered, and that respondents then marked a portion of it "K. & Co."

Upon a cross-examination of the witnesses from which this evidence was elicited, it was ascertained for the first time that the alleged contract of sale of the wood by Gotardi & Co. to

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respondents was in writing. The evidence showed, however, that the writing was lost, mislaid, or destroyed, though it failed to show that respondents had made any effort to find or produce it. Thereupon the appellants' counsel moved the court to strike out the evidence as to the terms of the said contract; but the court overruled the motion, and the counsel excepted to the ruling. This ruling was clearly erroneous. The respondents were not entitled to the benefit of oral proof of the contents of the writing, without first proving that they had used due diligence to find it, and had been unable to find it, or that it was destroyed. Nor was the error cured by the court's charging the jury that if the contract was reduced to writing, they were not at liberty to consider any oral evidence of its terms, and that if any such evidence had been admitted, it should be disregarded by them. The court had no right under the circumstances to refer any such question to the jury; it was addressed to the court, and should have been decided by the court. Besides the alternative portion of the instruction was incorrect under any view. The jury were told, in substance, that if respondents and Gotardi & Co. afterwards verbally changed the terms of the written contract, and the wood was delivered and received under such verbal contract, then this contract could be proven by parol, and the terms of the written contract would be immaterial as between the parties to this action. Had they been told that if Gotardi & Co. delivered the wood to respondents under a verbal agreement, transferring it from the former to the latter, and they found that the wood at the time belonged to the former, the fact of there having been a written agreement entered into between said parties prior to that time would be immaterial, the instructions would have been unobjectionable. But the jury could not have known that the parties "changed" the written contract without first knowing its terms, and they could not have known its terms in the absence of the writing. The court told them they were not at liberty to consider any oral evidence of its terms, if it had been reduced to writing. The instruction taken altogether is clearly inconsistent.

The appellants' counsel had requested the court, prior to the

giving of the said instruction, to instruct the jury, to the effect that if the respondents took and received the wood under an agreement of purchase, and if they believed the agreement was reduced to writing, and it was the only contract which was made by the parties at the time respondents claimed they took possession of the wood, that it was incumbent upon the respondents to produce the agreement, and that they were not at liberty to consider any oral testimony of its contents; and that if they believed that the writing was the only contract which the parties made at the time, there was no evidence before them on which they could find for respondents; which instruction the court refused to give, and the appellants' counsel excepted to the refusal. This instruction, in the main, I believe to be good law; but the question recurs again, what had the jury to do with the matter? It is the court's province to judge of the competency of testimony, and its duty to admit or exclude it. Probably if there had been a conflict in the evidence, as to whether the agreement regarding the purchase of the wood had been reduced to writing or not, it could have been submitted to the jury to find upon that point; but no such conflict seems to have been made in the case, and the court should have disposed of the whole question during the examination of the witnesses at the trial. That the trial court committed error in the matter referred to, there can, it seems to me, be no doubt, and if it affected the substantial rights of the appellants, would be good ground for reversing the judgment appealed from. Whether it did that, however, I have grave doubts. It is not every error committed in the trial of an action that will justify the reversal of the judgment recovered therein. In order to warrant such a determination, it must be a material error. The party against whom it is committed must be prejudiced in consequence of it. An error that could not possibly have injured the party would be no cause for complaint.

The material issue in this case, as before suggested, was who owned the wood in question when cut. If it belonged to Maria & Co., and Anlauf Bros. succeeded to the title to it, then the respondents had no claim upon it, or cause of action, even though

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Gotardi & Co. sold it to them and delivered them the possession of it. But on the other hand, if the wood belonged to said Gotardi & Co. in the beginning, and they invested the respondents with the possession of it simply, the latter would have had such a possession as would have entitled them to maintain the action as against mere wrong-doers, who had interfered with it. The appellants occupied that position, if the wood belonged to Gotardi & Co., and not Anlauf Bros. The question of proprietorship of the wood had to be first determined. I mean the original proprietorship as between the parties referred to; and as before observed, the jury must have found for respondents upon that question. That Gotardi & Co. cut and owned the wood, and not Maria & Co. or Anlauf Bros., was the keystone of the respondents' case, and when that was established, it upset any pretended right of the appellants to the wood, or authority to interfere with it. Their defense was then overthrown in the main. They could still question the right of the respondents to maintain the action, but when the latter showed that the wood had been delivered to them by the lawful owners of it, they were entitled to sue a mere intruder for converting it. A lawful possession is sufficient for that purpose as against one having no right. We held that in this case when here the last time before this, and I have no doubt but that it is sound.

The question, then, as to the terms of the sale of the wood from Gotardi & Co. to respondents, or as to whether any such sale, in fact, was made, was not a material issue in the case, provided the respondents were in possession of it under authority from the true owners at the time the appellants took it, and are charged with having converted it. If the error had been of such a character as to have disparaged the title of Anlauf Bros., or to have prevented an inquiry into that of Gotardi & Co., the case would have stood differently. It would then have affected the merits, and have furnished grounds for claiming that it changed the result of the trial; but under the circumstances, no such consequence could possibly have attended it.

There was ample proof aside from the contents of the writing to enable the respondents to maintain the action, in case the fact

By the Court.

existed, that the wood belonged to Gotardi & Co., and which, in view of the verdict of the jury, we must presume did exist.

The judgment appealed from will therefore be affirmed.

[Filed January 10, 1888.]

JOHN F. MILLER, APPELLANT, v. JAMES TOBIN,
RESPONDENT.

PRACTICE—COSTS ON APPEAL.—The prevailing party is entitled to costs in this court in equity cases, unless equitable considerations arising out of the facts of the particular case should render a different rule necessary.

APPEAL from Klamath County.

N. B. Knight, for the Motion.

Watson, Hume & Watson, contra.

By the COURT.—After final decree in this case, and within the time allowed by the rules of this court to file a petition for rehearing, appellant has filed a motion to be allowed costs, because the question upon which the case has been finally disposed of was not raised at the argument of the demurrer at the May term, 1883, of the court below, when the appellant's legal remedy still existed; but on the contrary, was raised at the first time upon the merits in the fall of 1885, after the appellant had been at great expense in taking his testimony, and after his legal remedy was barred by the Statute of Limitations.

We have heretofore announced in equity cases the prevailing party in this court is entitled to costs, unless there should be equitable considerations arising out of the facts of the particular case which seemed to render a different rule necessary. This is the rule which has always prevailed in equity as to costs. In this case the party applying for costs is the plaintiff. He selected the forum and chose his own remedy and failed. The court below decided the case against him on the very ground upon which the case was placed here. He was as much bound to know

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the law as was the defendant, and we fail to perceive any reason in the circumstances of the case which would require the application of the rule which the appellant invokes.

Let the motion be overruled.

[Filed January 10, 1888.]

JOHN KEARNS, RESPONDENT, v. J. L. FOLLANSBY,
APPELLANT.

REVIEW—APPEAL.—A demurrer to the complaint was filed in a Justice's Court, which being overruled, no other pleading was filed, and final judgment rendered. An appeal lies from such judgment, and therefore a writ of review cannot be sustained.

APPEAL from Marion County. Reversed.

George H. Burnette, for Appellant.

E. A. Downing, for Respondent.

STRAHAN, J.—A writ of review was sued out of the Circuit Court of Marion County, directed to the justice of the peace of Stayton precinct, requiring him to certify to the Circuit Court of said county the record in the case of *Follansby v. Kearns*, lately decided in said Justice's Court. In obedience to said writ, the justice certified said proceedings to the Circuit Court. At the next term of said court, the present appellant appeared therein, and moved to dismiss the writ of review, and to remand the cause to said Justice's Court, for the reason, amongst other things, that the plaintiff herein had a plain, speedy, and adequate remedy for the errors complained of, by an appeal from the justice's judgment; but this motion was overruled, and upon looking into the record the Circuit Court reversed the judgment of the justice. From this judgment of the Circuit Court this appeal is taken.

It appears from the return of the justice annexed to the writ that J. L. Follansby, the appellant herein, commenced an action in the Justice's Court of Stayton precinct against John Kearns,

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to recover \$34.22 on account of goods delivered to one Grier at the request of said Kearns, and upon the promise of said Kearns that if Grier did not pay for them he would. A demurrer was filed to the complaint, for the reason that the facts stated did not constitute a cause of action, in that it stated a collateral parol agreement to answer for the debt of another, and was therefore void. This demurrer was overruled by the justice, and the defendant refusing to plead further, judgment was taken against him for the amount claimed, and he then instituted the present proceeding. If the question were before us, there seems no reason to doubt that the defendant's objections presented by the demurrer were well taken, and ought to have been sustained by the justice; and such was the view of the Circuit Court. But we are of the opinion that we cannot consider it in the present proceeding. An appeal was the proper remedy of the aggrieved party in this case, and not a writ of review. In *Ramsey v. Pettingill*, 14 Or. 207, we held, in effect, that appeal and review are not concurrent remedies under the Code, and that if the case is such that a party had the right of appeal, he was bound to pursue it to the exclusion of review, or any other remedy.

We do not care to restate the law further than to refer to what was said in that case. This was not a case where judgment was given for want of an answer. A demurrer is an answer within the meaning of section 2117 of Hill's Code. Section 536 of Hill's Code contains substantially the same provision as section 2117 as to judgments for want of an answer being non-appealable, and yet it is the constant practice, and has been since the adoption of the Code, to appeal to this court from the ruling of the lower court on a demurrer. And it has never even been suggested here that such a judgment was given for want of an answer. No reason is perceived why these two provisions, though relating to appeals from different courts, should not on this point receive the same construction. *Long v. Sharp*, 5 Or. 438, was cited by the respondent as being contrary to what is here said. In that case an answer had been filed in the cause pending before a justice, which was stricken out on motion, and a judgment then given against the defendant "for want of an answer," and it was

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held that it was non-appealable for that reason, and that therefore review was the proper remedy. But that is not this case; and the principle decided in *Long v. Sharp, supra*, is one that cannot be enlarged or extended. Besides this there may be room to question whether or not “a judgment for want of an answer,” according to the true intent and meaning of the statute, can only be taken in the manner and under the circumstances contemplated in section 249 of Hill’s Code. I am unable to perceive any real distinction between a judgment for want of an answer and judgment “upon failure to answer.” But the consideration of this question is now unnecessary.

The judgment of the court below will be reversed, and the cause remanded with directions to dismiss the writ.

[Filed January 10, 1888.]

STATE OF OREGON, RESPONDENT, v. WILLIAM SHEPPARD, APPELLANT.

JURIST’S COURT—JURY TRIAL IN—PARTY CALLING FOR, CONCLUDED BY THE VERDICT OF, WHEN.—The party calling for a jury in a Justice’s Court is concluded by the verdict thereof, unless the fine or judgment be for an amount of money not less than fifty dollars. (Hill’s Code, § 2170.)

JUDGMENT IN, AS TO COSTS IN CRIMINAL CASE.—A judgment of a justice of the peace, that a defendant convicted of a petty offense pay a fine of thirty dollars and costs, taxed at fifty-four dollars, and that in default he be imprisoned until such fine and costs are paid, not exceeding forty-two days, is without warrant of law. (Overruling *State v. Crowley*, 11 Or. 512.)

APPEAL from Polk County. Reversed.

G. W. Belt, for Respondent.

J. J. Daly, and N. L. Butler, for Appellant.

LORD, C. J.—On a complaint filed in a Justice’s Court, the defendant was charged with the crime of assault and battery. Issue being joined on a plea of not guilty, the defendant demanded a jury, which being duly summoned and sworn, a trial was had, and a verdict of guilty returned against the

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defendant. The court thereupon sentenced the defendant to "pay a fine of thirty dollars and the costs of the action, taxed at fifty-four dollars, and that he be imprisoned in the county jail until said fine and costs are paid, not exceeding *forty-two days*." From this judgment an appeal was taken to the Circuit Court, where the district attorney filed a motion to dismiss the appeal, for the reason "that the record of said appeal showed upon its face that said appeal was taken from a judgment given upon the verdict of a jury, demanded by the defendant, which said judgment was for a fine of less than fifty dollars, *exclusive of costs and disbursements*." The court sustained the motion and dismissed the appeal, and from the order of dismissal this appeal is taken.

The Code provides that "no appeal can be taken by the party who demanded a jury from a judgment in a Justice's Court, given upon a verdict of such jury, in either a civil or criminal action, unless the judgment be for a fine or amount of money not less than fifty dollars, or for the recovery of personal property of the value of not less than fifty dollars, exclusive of costs and disbursements in either case, or imprisonment of such party not less than twenty-five days." (Hill's Code, § 2170.) To authorize an appeal the criminal phrase of this section contemplates two cases, one where the judgment is "for a fine not less than fifty dollars, exclusive of costs," and the other where the judgment is "for imprisonment not less than twenty-five days." In a word, the test of a party's right to appeal from a judgment of a Justice's Court in a criminal action, the other facts concurring, is, that the fine imposed by the judgment shall not be less than fifty dollars, exclusive of costs, or that the imprisonment fixed by the judgment shall not be less than twenty-five days. The defendant was a party against whom a judgment was given in a Justice's Court upon the verdict of a jury, demanded by him for a fine less than fifty dollars, namely, "a fine of thirty dollars, and costs taxed at fifty-four dollars," and which judgment further provided, "that he be imprisoned in the county jail until said fine and costs be paid, not exceeding *forty-two days*."

In the event of the non-payment of the fine and costs, the

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number of days fixed for the imprisonment under the judgment is in excess of twenty-five days, namely, *forty-two days*. Hence, it is insisted, although the fine is less than fifty dollars, and would not entitle the defendant to an appeal, yet the imprisonment which the defendant must undergo without payment of the fine and costs, as limited in the judgment, being greater than the number of days designated by the section to authorize an appeal, he has a right to appeal from the judgment, and consequently the court below erred when it dismissed his appeal. The jurisdiction of justices in criminal as well as civil cases is limited, and the limitation is usually controlled by the penalty prescribed for the offense, the fine that may be imposed, or the imprisonment that may be inflicted. But whatever these limitations may be, they are the bounds, fixed by the law, within which such courts must exercise their jurisdiction. Any judgment, therefore, of such court, imposing a fine or inflicting an imprisonment unauthorized by law, or in excess of jurisdiction, would necessarily be void.

In the case in hand, it will be observed, (1) that the form of the judgment against the defendant is for a fine, and that the imprisonment in the contingency provided is not inflicted as a punishment, but as a means of coercing the payment of the fine and costs; and (2) that the number of days designated, which the imprisonment is not to exceed, namely, *forty-two days*, is computed by aggregating the fine and costs, and allowing two dollars for each day's imprisonment. The offense of an assault and battery for which the defendant was convicted the Justice's Court had jurisdiction of, and was authorized to impose a punishment, by fine not less than five nor more than fifty dollars. (Hill's Code, § 2052, subd. 6.) The court was therefore authorized to impose the fine adjudged against the defendant, but there is no authority given under the subdivision cited to impose any other punishment than a fine. The court could not inflict imprisonment as a punishment, or at all, except in aid of, and as subsidiary to the enforcement of the payment of the fine, and only then by virtue of authority derived from some statute. This is true of inferior courts, whatever may have been the prac-

tice at common law of superior courts, exercising criminal jurisdiction. (Bishop's Criminal Law, § 1132; *Hill v. State*, 2 Yerg. 248.) But it is provided that "a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine," etc. (§ 1408, Hill's Code.) Under this section the period specified for imprisonment, unless the fine be paid, cannot exceed one day for every two dollars of the fine, and applies only to the fine imposed, and does not include costs incurred in the prosecution of the action. It is a direction to and limitation upon the power of the court when a judgment for a fine is given. It directs that when a fine has been adjudged, the court must imprison until the fine be satisfied, limiting the term of the imprisonment to a time specified, which bears a certain relation to the amount of the fine.

As subdivision 6 of section 2052 only authorized the imposition of a fine as a punishment, and as section 1408, for the purpose of enforcing the payment of the fine and not as a punishment, directs that the defendant be imprisoned until the fine be satisfied, not to exceed one day for every two dollars of the fine, it follows that when the defendant was adjudged to pay a fine of thirty dollars, the imprisonment specified for the purpose of coercing its payment could not exceed fifteen days. To construe section 1408 otherwise, that is to say, as authorizing a punishment by imprisonment, would look like convicting the defendant under one law (§ 2052, subd. 6), and punishing him under another (§ 1408), unless the two must be read together, and are in practice *in pari materia*, the true intent and purpose of section 1408 being not to pronounce imprisonment as the punishment, but as a means of coercing the payment of the judgment for a fine for an assault and battery under subdivision 6, section 2052. (*People v. Markham*, 7 Cal. 208; *Ex parte Kelly*, 28 Cal. 415; *Ex parte Bolleg*, 31 Ill. 89.) In speaking of a like section (1205) in Cal. Code, Sanderson, C. J., said, in *Ex parte Kelly*, *supra*: "The imprisonment is no part of the punishment *per se*, but is merely one of the modes by which the law enforces the satisfaction of the fine,

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which is in itself the punishment, or a part of it." So that, taking these provisions together, when the defendant was convicted of an assault and battery, the court was authorized to impose "a punishment by a fine of not less than five nor more than fifty dollars," and, therefore, it had the right to sentence the defendant to pay a fine of thirty dollars, and direct further that he be imprisoned until the fine be satisfied, such imprisonment not to "exceed one day for every two dollars of the fine," that is, not to exceed fifteen days; but not to direct that he be imprisoned "until the fine and costs be paid, not exceeding forty-two days," the period of imprisonment being one day for every two dollars of the fine and costs aggregated.

Reserving the question of the validity of such judgment for the present, it is manifest that the fine imposed was less than the sum designated by section 2170, *supra*, which would entitle the defendant to appeal, or regarding the imprisonment as a punishment, which we deny, for the time authorized by law, namely, fifteen days, still the period of such imprisonment would be less than the minimum specified, which would authorize an appeal; but otherwise, if the number of days named in the judgment, computed on the basis of one day for every two dollars of the fine and costs, aggregated, is to be regarded as an imprisonment within the meaning of that section. As already explained, we regard the number of days specified in this section, for which an appeal lies, to refer to a judgment for imprisonment pronounced by the court as a punishment, and not to refer to a case, as here, where the defendant was convicted and sentenced to pay a fine under a law which authorized no imprisonment, except as derived from section 1408, *supra*, and authorized as a conveyance of the power to fine, and for the purpose of coercing its payment, and not as a punishment. So that in this case, we are to look to the fine adjudged, and not to the time of imprisonment directed to enforce its payment, to determine the defendant's right to appeal.

In this view, the maximum fine authorized to be imposed upon conviction of assault and battery is the only case where an appeal would lie under section 2170, *supra*, and the fine imposed as shown by this record being less than fifty dollars, there was

no right of appeal. This disposes of the contention of counsel for the defendant, which involves the error of supposing that the imprisonment directed to enforce the payment of a judgment for a fine in a Justice's Court can be the basis of an appeal. In this case, it is the amount of the fine alone that determines the right of appeal. But the Circuit Court not only dismissed the appeal, but gave judgment against the defendant, as it was given in the Justice's Court, and for costs and disbursements. (Hill's Code, § 2128.) This necessarily affirmed or carried into effect that part of the judgment which directs that the defendant be imprisoned until the fines and costs be paid, not exceeding forty-two days. The course of the argument has incidentally, if not directly, tended to show that this was error, and unauthorized by law, as to the costs.

It is claimed by the attorney for the State that imprisonment for costs is allowed by section 2145 of Hill's Code, and that in a like case, it was so held in *State v. Crowley*, 11 Or. 512. That section only undertakes to provide the substance of a form to be used by justices upon a judgment of conviction for entries in their docket, and necessarily the application will depend upon the statute under which the defendant is tried and convicted. To illustrate if he be tried and convicted under some statute of which a justice has jurisdiction, providing for a punishment by fine, and his imprisonment until such fine and costs are paid, on the rates of one day for every two dollars of such fine and costs, as the Circuit Court is authorized to do under section 1968, then the fine and costs may be aggregated, and he be imprisoned until the same be paid, not to exceed one day for every two dollars of such fine and costs, as was done here. In such case, section 1408, *supra*, has no application. (See *Ex parte Harrison*, 63 Cal. 300.) But if the defendant be tried and convicted, the sentence of the court under the law be a fine, as in the present case, and the enforcement of its payment is dependent on section 1408, there the period of imprisonment cannot exceed one day for every two dollars of the fine. That section is not intended to enforce the payment of the fine and costs of the action by imprisonment; its language is confined exclusively to the fine, and it is only as to the fine that the party may be imprisoned at the rate of one day for

Points decided.

every two dollars of the fine. Hence the Justice's Court in fixing the time of imprisonment not to exceed one day for every two dollars of the fine and costs aggregated, acted without warrant of law.

As this result is in conflict with *State v. Crowley, supra*, that case must be considered as overruled in the particular here mentioned, although it may be proper to state, as the opinion indicates, that the attention of the court was almost exclusively directed to the validity of a statute authorizing imprisonment for costs. But in view of the holding in that case, it is due the learned court below to say, that the error it made in entering that judgment sprang out of our error in that case.

As such judgment is void it must be reversed, and the cause remanded for such further proceedings as may be proper in accordance with this opinion.

[Filed January 16, 1888.]

D. P. THOMPSON, RESPONDENT, v. THE WILLAMETTE
S. M. L. & MANUF. CO., APPELLANT.

RECEIVER—COMPENSATION OF.—The fact that a receiver may perform duties from which others may derive a benefit, or which he may not be required to perform, but may employ others to do, yet if he chooses to perform such services, and his authority to do it is derived from his office, it furnishes no basis for an extra charge, but is included in his compensation as receiver.

WHEN SAME FIXED BY THE COURT.—When such services are necessary and a part of the duties of his office, the fact that others may be benefited cannot affect his obligation to perform them, or give him any claim in his own right to any other pay than that fixed as the measure of his compensation for discharging all the duties of his office.

EXTRA ALLOWANCE—WHEN MAY BE GRANTED.—Where a receiver performs duties in addition to those ordinarily required, it may form the basis of an application for an extra allowance, which the court may grant.

NOMINAL SERVICES OF.—Where the facts showed that the plaintiff owned no stock in his individual right; that it was only in an official capacity that he was known to the corporation, or eligible to hold its offices; that the services rendered were performed in connection with his receivership for which he had been paid; that such services were merely nominal, the actual duties being, in the main, performed by the vice-president; that it was by virtue of such connection and title that the corporation gave him the presidency, and thereby the power to act for it; *held*, that the corporation's liability for such service was not to him in his own right, but to him in right of the estate to whom he owed, or such service belonged.

Opinion of the Court—Lord, C. J.

APPEAL from Multnomah County. Reversed.

Dolph, Bellinger, Mallory & Simon, for Appellant.

J. K. Kelly, J. C. Moreland, and W. Y. Masters, for Respondent.

LORD, C. J.—This was an action to recover \$6,475, as salary for services performed as president of the defendant corporation. To avoid prolixity, the facts may be thus summarized: The plaintiff was appointed a receiver in a certain suit pending between Ben Holliday as plaintiff and Joe Holliday as defendant, and by virtue of his office as receiver, and as part of the property involved in such litigation, there was transferred and delivered to him as such receiver three fifths of all the shares of stock of the defendant corporation, and the same were in due form transferred to him, and in his name as such receiver on the books of the defendant corporation, and that he had no other, nor ever has had any stock in the defendant corporation, except as thus transferred to him as such receiver; that by virtue of holding said stock as such receiver, the plaintiff was elected a director of the defendant corporation by the votes of Weidler and Strong, the other two directors, who held the remaining two fifths of the shares of stock of the defendant corporation, and by them chosen president, after having duly qualified as director; that while acting as such president, the plaintiff exercised supervision over the business of the corporation, and performed some of the duties required of the president, but his actual employment therein engaged only a very small portion of his time and attention, and that the duties which principally belonged to the office of president, and devolved upon him as such, were attended to and performed by Weidler, the vice-president; that the pay or salary of the president of the defendant corporation, prior to the appointment of the plaintiff as receiver, was fixed by a resolution, duly passed, at two hundred and fifty dollars a month, and that such resolution was in full force and effect during the period plaintiff was president of the defendant corporation; that the plaintiff has not been paid by

the defendant corporation any sum whatever as salary for his services as president, but that he was allowed by the court as receiver in the suit aforesaid, and has been paid for his services as such, the sum of five hundred dollars a month, during all of said period, and that his duties as receiver extended to all the property involved in said suit, of which the stock in the defendant corporation constituted but a small portion. Upon this state of facts, the cause having been tried without a jury, the court gave judgment for the plaintiff, and the defendant brings this appeal.

The plaintiff bases his claim to compensation on the ground that the services he performed as president were authorized by and for the benefit of the corporation, and that as the corporation itself was not involved in the litigation, it cannot avoid liability on the theory that the services so performed were incident to his duties as receiver, and for which he had received compensation. He therefore insists, while admitting his relation to the stock, and his duty to take care of and protect it for the interests of the estate in litigation, the same as other property intrusted to his custody as receiver, yet, as the court has no power to appoint a receiver for the corporation, or to make the plaintiff president of it, the services he rendered as such officer could not have devolved upon him, nor have been included in his compensation as receiver. The plaintiff brought this action, and recovered judgment against the defendant for services rendered as president in his own right and for his individual benefit. The facts show that individually he owns no stock in the defendant corporation, and is ineligible to hold the office of president; that the stock assigned and delivered to him, and transferred on the books of the company, is to him in his representative character as receiver, and that it is only in such character he is known to the defendant, eligible to hold its offices, perform the duties thereof, and receive the compensation fixed for such service, and therefore it is only as receiver or representative of the stock in litigation in his custody that he was qualified or elected to hold the office of president.

It is said that he abstained from voting for himself; did not

“cause himself to be elected”; but that the office of president was conferred upon him by the voluntary votes of the other two directors. Whether he voted or not for himself, he could only vote in his representative, and not in his individual capacity; and it was as such he was elected and performed the services, his right to thus act being based on the shares he represented for the estate in litigation, and of which he was receiver. Pending the litigation, his relation to the stock, so to speak, was that of the true owner, and he was trustee for him. As that stock constituted a part of the subject-matter in litigation, while it was in his charge, he owed it such duties as the nature of the property and its profitable management required; and as a consequence, his compensation as receiver included such duties or services as are incident to its custody and his office, and which he may have performed in respect to it. In a word, whatever services he may have performed, although done as president, it was done by virtue of his title as receiver, and for such services the admitted facts show he has been paid. It may be true that he was not required to act as president; that Weidler might have been elected to that office, as he did, in fact, perform substantially its duties; but if he undertook to discharge its duties, he acted in his official capacity, and whatever benefit or emolument resulted, or which the defendant corporation became liable to pay, it belonged to the estate which he represented, and entitled him to no additional charge as receiver, much less as an individual.

The fact that a receiver may perform duties from which others may derive a benefit, or even which he may not be required to perform, but may employ others to do, yet if he chooses to perform such services, and his authority to do it is derived from his office, it furnishes no basis for an extra charge for his profit or emolument, but is included in his compensation. If this is true, on what basis can the plaintiff's claim stand? The argument that the services sued for were rendered to the corporation, and not to the estate, which the plaintiff represented, is only partially true, and in a qualified sense. The majority of the stock of the corporation was a part of the estate in litigation

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of which the plaintiff was receiver, and by virtue of which he became eligible for, and was elected to the office of president. The business of a corporation is managed for the benefit of its stockholders, and as the estate was the largest stockholder, whatever services he performed, or benefit was derived therefrom, the estate got the major part, and was the largest beneficiary of them.

It is not certain that when the receiver represents the majority, or three fifths of the stock of a corporation, and the interests of the estate, for its protection and security, or profit and benefit, may require that he should assume the management, it is not his duty to do so. If such services are necessary, and a part of the duty of his office, the fact that others may be benefited cannot affect his obligation to perform them, or give him any claim in his own right to any other pay than that fixed as the measure of his compensation for discharging all the duties required of his office. If he is entitled to any further allowance, it should be by special application to the court, with a statement of the circumstances. In his own right, the corporation owed him nothing, nor had he performed any services for it in that character. It only knew him as an agent or trustee, holding the shares in trust for the true owner, as the result proved Ben Holliday, with capacities to represent him at the council board, to take his place as director, and to do such things and perform such services for the corporation as such true owner would be authorized to do. Their books showed the nature of his agency, and the character in which the corporation was authorized to deal with him, and he to act for it. Necessarily, therefore, it would know the nature of the right in which his claim for services or for the salary attached, and that when such services were rendered to the defendant corporation, he rendered them, not in his own title, but by title derived from the estate, and as it were, standing in Holliday's shoes, and consequently he could have no claim for such services, or for the salary in his individual right, or for his individual benefit—the right in which he has sued. As between the plaintiff and the estate, it can hardly be denied that the services might not be treated as included in

his compensation as receiver, on the principle that the profits or emoluments arising from the trust property, or services rendered by the receiver incident thereto and for its benefit, belonged to the estate, and not to him, and that if such compensation had been paid to him, he must have accounted for it as part of the gains and profits accruing to the estate. It is stated, as a general rule, that where a receiver acts in more than one capacity, his compensation must be nominal or wholly disallowed, and that the regular allowance made to a receiver for his services must be held sufficient to compensate him for all the labor which he performs in connection with the receivership, and as a result, that he is not entitled to anything in addition thereto. (Beach on Receivers, §§ 768, 769.) No doubt where a receiver performs duties in addition to those ordinarily required, it may form the basis of an application for an extra allowance, which the court may grant. (*Farmers' Trust Co. v. C. R. Co.* 8 Fed. Rep. 60.) Now the facts found show that he owned no stock in his individual right; that it was only in a representative capacity that he was known to the corporation, or eligible to hold its offices; that the services he rendered were performed in connection with his receivership, for which he had been paid, and that such services were merely nominal, the actual duties being performed, in the main, by the vice-president; that it was by virtue of such connection and title that the corporation gave him the presidency, and thereby the power to act, or perform services for it, and as a consequence, that its liability for such service was not to him in his own right, but to him in right of the estate to whom he owed, or such services belonged, assuming, of course, the services rendered were such as earned the salary.

It results upon the facts as found that the plaintiff is not entitled to recover, and his complaint must be dismissed.

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[Filed January 16, 1888.]

HENKLE AND DAVIS, APPELLANTS, v. GEORGE W. DILLON ET AL., RESPONDENTS.

REAL PROPERTY—FIXTURES—RELAXATION OF COMMON LAW.—When and under what circumstances and conditions a chattel becomes annexed to land, so as to subject it to the same conditions in every respect, is frequently difficult to determine; but with the growth and development of trade and manufactures, much of the strictness of the common law on this subject has been relaxed.

FIXTURE—WHAT IS.—To give a chattel the character of a fixture, and render it immovable, three things are necessary: (1) Actual annexation to the realty, or some appurtenant thereto; (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties making the annexation to make a permanent accession to the freehold.

AGREEMENT THAT CHARACTER OF CHATTELS SHALL BE UNCHANGED BY ANNEXATION—EFFECT OF.—When before annexation parties agree that things personal in their character shall continue to be personalty, or retain their character as chattels though annexed to the realty so as to become a part of it without such agreement, they will continue to be chattels if they can be removed without material injury to the articles themselves, or to the freehold.

FACTS OF PARTICULAR CASE.—Considered and held that the machinery in question was not so annexed to the freehold as to become a part of it.

APPEAL from Benton County. Affirmed.

J. W. Rayburn, for Appellants.

John Kelsay, S. T. Jeffreys, and W. S. McFadden, for Respondents.

E. B. Williams, for Staver and Walker.

STRAHAN, J.—Plaintiffs commenced this suit to foreclose a mortgage on certain real property in Benton County, given by the defendants, George W. Dillon and Olive, his wife, to the plaintiffs, to secure the payment of a certain promissory note to them for the sum of \$1,002.20, with interest after April 26, 1886. The mortgage was executed on the same day. The note was signed by Dillon Bros., a firm composed of G. W. Dillon, D. M. Dillon, and J. W. Dillon, all of whom were made defendants in the suit. After the suit was commenced, and before final decree, the defendants Staver and Walker appeared, and made such representations to the court as to their interest in some part of

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the litigation, that the court ordered them to be made parties defendant, and gave them leave to file an answer.

They allege in their answer, in substance, that on the twenty-sixth day of March, 1884, Dillon Bros. executed to the J. I. Case Threshing Machine Company a chattel mortgage, to secure the payment of various promissory notes therein described, amounting to \$1,130, and interest, which chattel mortgage included the twelve-horse power traction self-steering engine in controversy in this suit, and that said chattel mortgage was duly filed with the county clerk of Benton County, Oregon, on the twenty-eighth day of March, 1884, and entered in the book of chattel mortgages, No. 1, page 168, all before said engine was in any manner attached to the land described in complaint; that said engine stood on wheels, and at the time said chattel mortgage was made, it was agreed and understood that the same should continue to be personal property, and that said J. I. Case Threshing Machine Company, or its grantees or assigns, should hold and continue its lien upon said engine until fully paid, and that said engine is and always remained personal property; that said engine was attached to said premises in such a manner that it could be easily removed without any material injury to the premises or said engine; that eight hundred dollars of said indebtedness still remains due and unpaid. For a separate defense, Staver and Walker allege that Dillon Bros. and Jos. Staver made their certain other chattel mortgage to secure the payment of three hundred dollars to Staver and Walker, which mortgage was dated December 20, 1884, and was duly filed with the county clerk on the thirty-first day of December, 1884, and entered in the book of chattel mortgages, and that said last-mentioned mortgage included one J. I. Case T. M. Co.'s double saw-mill, No. 163, together with all saws, tools, belts, or appurtenances in anywise connected therewith, and that it was stipulated in said chattel mortgage that said mill was to be located on forty acres of land, being northwest one quarter of the southeast one quarter, section 5, township 11 south, range 5 west; that plaintiffs had notice of an agreement that said saw-mill should remain personal property, and was subject to Staver and Walker's

lien until they were fully paid, and that the same has always remained personal property; that said saw-mill and appurtenances were so attached to the premises mentioned in the complaint that they could be easily removed without any material injury to said saw-mill or appurtenances; and that said note and interest remains due and unpaid. Properly certified copies of said chattel mortgages are annexed to the answer. It is also alleged in the answer that Staver and Walker had, before the suit was commenced, succeeded to the interest of the J. I. Case T. M. Co. in the note and mortgage made to that company by assignment. There were some affidavits annexed to said chattel mortgages for the purpose of renewing same, but the view we have taken of the case renders their consideration unnecessary. The evidence was taken in writing, and accompanies the transcript. The court below rendered a decree foreclosing the plaintiffs' mortgage on the real property described in the complaint, but refused to include in the decree an order for the sale of the engine and portable saw-mill described in the chattel mortgages, from which decree the plaintiffs have appealed to this court. An examination of the positions relied upon by the appellants' counsel is therefore necessary.

1. The main position relied upon by him is that before the date of the plaintiffs' mortgage, Dillon Bros. and Staver had so annexed the twelve-horse power traction self-steering engine and the portable saw-mill in controversy to the real estate described in the mortgage, as to make the same a part of the land, and subject to the mortgage. From the evidence taken it appears that at the time the engine and mill were placed upon the premises, the legal title to said land was in the State; but G. W. Dillon was in possession thereof under a contract of purchase, and that before the plaintiffs' mortgage was executed, he made full payment to the State for said land, and received a deed therefor. It further appears that Dillon Bros. occupied this land for the purposes of their milling business. The engine was held in place by three blocks that were sitting on the sills. The floor was laid right around them, so that they couldn't move on the floor. Two of these blocks had grooves cut in the top,

so that they could fit the hind axle of the engine, and the front block was cut in a circle to fit the front end of the boiler, and the engine was sitting on those blocks. The boiler was let down on the blocks above mentioned, and a brick ash-pan was put underneath the fire-box of the boiler. The ash-pan was in no way fastened to the engine or boiler. The engine was connected to a J. I. Case portable double circular saw-mill by means of a ten-inch rubber belt running from the fly-wheel of the engine to a pulley on the mandrel of the mill. The engine was in no way attached to the premises on which it stood. The saw-mill machinery was all connected to a square frame known as the buck frame, which was about seven feet long by four feet wide, which was made of timbers three by twelve or fourteen inches. The mandrels, pulleys, levers, arbors, and belts were all connected to the square frame, except the carriage. This frame was set on the floor of the building, and four bolts came up from the floor at each corner of the frame, and went through a block which was laid across the corner of the frame and screwed down in such a manner as to clamp the frame so it would not move around. The object of locating said engine and mill on said premises was to saw there until timber became scarce and unhandy, and then move to where it was more convenient to timber. This machinery is the same described in the chattel mortgages mentioned in the answer of Staver and Walker.

It further appears that after Dillon Bros. purchased the engine in question, the first work they did with it was in sawing wood around Corvallis, and when threshing season commenced, they took it and went out threshing; after the threshing season was over, they continued to saw wood around town until late in the fall. The following spring they moved out on Soap Creek, and sawed lumber until harvest, and during the threshing season they ran a thresher with the engine until the season was through, and then moved back on Soap Creek and continued to saw until fall; then they moved the engine to another place, and continued to saw till the first of June, and then they took the engine and again went out threshing. In the forepart of July, 1886, the engine was taken out of the building where it had been used to

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run the saw-mill for the purpose of again engaging in threshing, and on the highway, in said county, Staver and Walker took possession of the same, and also about the same time they took actual possession of the saw-mill in controversy. In removing the engine from the building where it had been placed by Dillon Bros. it was necessary to saw off a girt. The object was to put in a door at that place so that the engine could be taken in and out at pleasure. The mill had remained there in that manner from the latter part of January, 1885, to January, 1886. In September, 1886, the mill was taken to Souver's Station in Polk County, and left in the freight office. Staver and Walker had possession at the time of its removal. It also appears that Staver and Walker accepted the chattel mortgage in question on the mill as security for the purchase price thereof, and with the understanding that it would be placed on the land described. Do the undisputed facts subject the portable saw-mill and the traction self-steering engine in controversy to the plaintiffs' mortgage? The plaintiffs' sole reliance to accomplish this result is, that they were affixed to the soil, and became a part of the realty, and are subject to the same rules of law as the soil itself.

When and under what circumstances a chattel becomes so annexed to land as to subject it to the same conditions in every respect is frequently difficult to determine. There can be no doubt that with the growth and development of trade and manufactures, much of the strictness of the common law on this subject has been relaxed. According to the more recent authorities to give a chattel the character of a fixture, and to render it immovable, three things are necessary: "(1) Actual annexation to the realty or some appurtenant thereto; (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties making the annexation to make a permanent accession to the freehold." (Herman on Chattel Mortgages, 6; Ewell on Fixtures, 21, 22; Tyler on Fixtures, 114; *Case Manuf. Co. v. Garver*, 13 N. E. Rep. 493.) So when things personal in their character are about to be annexed to the realty, and before such annexation the parties by express agreement provide that such

chattels shall retain their character as personalty, or retain their character as chattels, although attached to the realty in such manner that without such agreement they would lose that character, they will continue to be chattels, if they can be removed without material injury to the articles themselves, or to the freehold. The agreement will govern, if the article is so attached that it can be removed without material injury to it or to the realty, or if from the circumstances attending, it is evident or may be presumed that such was the intention of the parties; and in every such case the thing which would otherwise have become a fixture retains its personal character. (*Ford v. Cobb*, 20 N. Y. 344, involved this principle.) In that case certain salt kettles were set in arches upon the salt block, in such manner that they could not be removed, except by tearing off a portion of the upper bricks of the arch and prying the kettles out by a plank and bars. A chattel mortgage had been executed on the kettles, and it was held that they continued to be chattels, and subject to said chattel mortgage.

In reaching this conclusion the court said: "Assuming, then, that these kettles would be parcel of the real estate, if the owner of the land was the unqualified owner of them when they were put up in the arch, we are to determine as to the effect of the arrangement in this case, by which the owner of the land and the owner of the kettles agreed that notwithstanding their annexation to the freehold in the manner which was contemplated, they should continue to be personal property so far as should be necessary to give effect to the personal mortgage. It will be readily conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed. Rights, by way of license, might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules, by which the succession of that species of property is regulated. But it is otherwise with things which, being origi-

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nally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction or material injury to things real, with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement, or of any special relation between the parties in interest, they would be part of the real estate."

So in *Eves v. Estes*, 10 Kan. 314, it is said: "But when we consider the purpose of the parties as evinced by the mortgage to make the engine retain the character of a chattel, regardless of the manner of its attachment to the mill, and as the mortgage violated no principle of law, wrought no injury to the rights of any, and was in the interest of trade, we have no doubt the engine continued to be personal property." And to the same effect is *Sisson v. Hibbard*, 17 Hun, 420, which case was affirmed by the court of appeals, 75 N. Y. 542; *Kinsey v. Bailey*, 16 Hun, 452; *Jones on Chattel Mortgages*, § 125; *Tift v. Horton*, 53 N. Y. 377; *Goddard v. Gould*, 14 Barb. 662; *Mott v. Palmer*, 1 N. Y. 564; *Herman on Chattel Mortgages*, § 138; *Gorman v. Dodge*, 9 West. Rep. 716. Considering the portable character of these chattels, the purposes and manner of their use, the way they were annexed, and the fact that the equitable title to the land was in one of the defendants only, while the ownership of the chattels was in the firm of Dillon Bros., and I would have no doubt whatever that without considering the chattel mortgages at all, or allowing their execution to have any influence on the question, this machinery never lost its character as a chattel, and remained unaffected by the plaintiffs' mortgage; but when is added to this the agreement between the parties, that the same should continue to be personalty, and the execution of the chattel mortgages, with power to take possession and sell in case of default, the correctness of that conclusion I think is placed beyond controversy.

2. Counsel for appellants insisted that there was no proof of the existence of the chattel mortgages in the record. He overlooks the effect of the pleading. Copies of said mortgages, certified by the clerk, so as to make them evidence, are attached to

Points decided.

the answer of Staver and Walker, and have come here without objection. In addition to this, throughout the whole case, their existence is constantly assumed. Besides it does not appear that there was any objection in the court below to the copies attached to the answer, and so far as appears, this objection is made in this court for the first time, and it could not for that reason be allowed to prevail.

3. Objection is also made that there is no proof that the mortgage to the J. I. Case Co. had been assigned to Staver and Walker. The conclusion reached renders that question immaterial. The existence of the mortgage and the actual possession of the mortgaged property after default are enough. The plaintiffs, showing no interest in the property, are not in a condition to question the rights of Staver and Walker. Mere possession must prevail in the absence of a superior title. There was some question made at the argument, as to the effect of the filing of these chattel mortgages, in giving notice to subsequent purchasers or encumbrancers, and of the failure of the mortgagee to renew the same under the statute; but there being no subsequent purchaser or encumbrancer in the case, the consideration of these questions is unnecessary. The mortgages were good and effectual between the original parties, and that is as far as we need inquire.

The decree of the court below will be affirmed.

[Filed January 19, 1888.]

H. M. LOONEY, RESPONDENT, v. N. H. RANKIN ET AL.,
APPELLANTS.

15	617
17	421
20	424
16*	680
21*	457
26*	277

15	617
37	511
15	617
46	193

EVIDENCE—WRITING—ORAL TESTIMONY CANNOT VARY TERMS OF.—Where a written contract is perfect upon its face, parol evidence cannot be introduced to add to, alter, or vary its terms.

SAME.—In case the writing show an admission, either directly or by fair inference, the jury should be instructed to find, in reference to the matter omitted, what the parties intended to have inserted therein.

CONTEMPORANEOUS AGREEMENT.—Where several writings of even date relating to the same transaction are introduced in evidence, they should be construed as parts of the same contract. (*Weber v. Rothchild*, 15 Pac. Rep. 650.)

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APPEAL from Clackamas County. Reversed.

Facts are stated in the opinion.

Johnson, McCowan & Idleman, and *R. & E. B. Williams*, for Appellants.

E. L. Eastham, and *T. A. McBride*, for Respondent.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Clackamas, recovered in favor of the respondent upon the verdict of a jury. The action in that court was against the appellants and one M. B. Rankin jointly. M. B. Rankin made no appearance. The complaint was upon three causes of action.

It is alleged in the complaint that the defendants in the action, during the times referred to therein, were partners, and did business, sometimes under the name of Rankin Bros., sometimes under the name of M. B. Rankin. That on the tenth day of November, 1882, respondent entered into a contract with defendants, whereby he agreed to render the services and labor of himself, and furnish the labor of his son, and the use of his team and wagon to defendants for the period of one year from said date, for the sum of \$700, which said sum defendants were to pay respondent for the said services and labor, and the use of said team; that respondent did perform said services and labor, and furnished the labor of his son, and the use of said team for the term of one year from said November 10, 1882, as agreed upon; and that defendant had paid no part thereof. It is also alleged in the complaint that between November 10, 1883, and January 1, 1884, respondent, at the special instance and request of defendants, paid out and advanced for defendants, sums of money amounting to \$274.08; that defendants had not paid it back to him excepting \$62. And it is further alleged in the complaint that respondent furnished defendants trees and timber in 1883, of the value of \$25, and that no part of the same, nor for the work and labor or use of the team, had been paid. The respondents answered, denying their liability,

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and denying that they ever entered into the alleged contract of November 10, 1882. Upon the trial the following writings were given in evidence:—

1. A receipt from M. B. Rankin to the respondent, of which the following is a copy:—

“PORTLAND, OREGON, Nov. 10, 1882.

“Received of H. M. Looney, stock, grain, and other personal property to the amount of \$2,300 in full of all demands to date.

“M. B. RANKIN.”

2. A paper executed by respondent to said M. B. Rankin, of which the following is a copy:—

“PORTLAND, OREGON, Nov. 10, 1882.

“In consideration of a receipt from M. B. Rankin bearing even date with this instrument, I, the undersigned, guarantee the title to the following property: All the cattle now on my farm in Clackamas County, in all twenty head, and thirty-eight hogs, two horses, seventy-eight sheep, and all the hay now on my farm, all the oats, peas, wheat, and potatoes on the farm. I further agree to let M. B. Rankin have entire control of all the proceeds of my farm, including the grain already sowed and the products of the balance of the farm, except the small lots in connection with the house, in all seven, not including the barn; but also to have the use of all farm tools now on farm, and one span of horses free of charge. And I further agree to render to M. B. Rankin my full time, and the time of my son Robertes, at any labor he may direct for the term of twelve months from the ninth day of this month.

H. M. LOONEY.”

3. The following receipt from M. B. Rankin to the respondent:—

“PORTLAND, OREGON, Nov. 10, 1882.

“I, M. B. Rankin, in consideration of a bill of sale of personal property and grain made to me by H. M. Looney of the same date, agree to allow and furnish all provisions for family use he may need for the term of twelve months from the ninth day of the above month.

M. B. RANKIN.”

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It appears from the bill of exceptions that when the paper was introduced in evidence, called a bill of sale, the respondent was on the stand as a witness, and upon being asked what it was, made answer thereto as follows: "This is a copy of a bill of sale I gave him," referring to M. B. Rankin, "in part payment of a farm I bought of him. It had no connection with this work. This refers to the same work which I have sued for, but the work was not done under this contract." And that when the receipt for the \$2,300 in stock, grain, and other personal property was introduced, said respondent stated that it was executed and delivered at the same time of his signing the bill of sale, as he termed it. The respondent, after giving testimony tending to show that the appellants and said M. B. Rankin were partners, offered to prove by his own testimony that he gave his time and services, and that of his son, and the use of his team for one year, and that said parties agreed to pay him therefor \$700—\$300 for himself, \$300 for the work of his son, and \$100 for the use of his team.

This evidence was objected to by the appellants' counsel, upon two grounds, the second one of which was that the writings showed that the service of the respondent and his son, and the use of the team, were to be rendered free of charge. The other ground need not be noticed. The court, it seems, overruled the objection so far as it related to the services of the respondent and his son, and the testimony concerning the agreement as to their services was admitted, and the appellants' counsel excepted to the ruling.

The court in its instructions to the jury charged them that if they found that a partnership did exist between said appellants and M. B. Rankin, then they would find whether or not respondent was to furnish his and his son's time and services in part payment for the farm sold to respondent by said M. B. Rankin, or whether he was to receive \$600 therefor. That if they found that this time and services were to be given in part payment for said farm, then they could not allow respondent anything; but if they found that it was under an agreement that he should receive \$600 therefor, they must allow him for

that amount. The counsel for appellants excepted to the instruction. The jury returned a verdict for the respondent for the sum of \$810.80, which evidently included the \$600.

There are several assignments of error in the notice of appeal, but the main one is the ruling upon the question of the right of the respondent to prove the agreement in regard to the said services of the respondent and his son, independent of the said writings. The services referred to are evidently those mentioned in the contract, termed the bill of sale. They seem to have been so regarded by the court in which the trial was had, and the counsel for the respondent makes no question to the contrary. And whether or not an agreement to pay, therefore, as claimed by respondent, could be proved by parol, in view of the fact that said writings were executed by respondent and said M. B. Rankin, is the question presented for our consideration. The solution of the question depends entirely upon the construction to be given to the said writings. The fact that parol evidence cannot be used for the purpose of contradicting, adding to, subtracting from, or varying the terms of a written contract, or to control its legal operations or effect, except to impeach it for fraud, or reform it for accident or mistake, is too well settled to require the citations of authorities to support it.

Another equally well-settled principle, kindred to the one above stated, is that all oral negotiations or stipulations between the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it. The reason of the rule, as explained by judges and text-writers, is, "that the parties, by making a written memorial of their transaction, have implicitly agreed, that in event of any misunderstanding, that writing shall be referred to as the proof of their act and intention, that such application as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because if they meant to be bound by any such, they might have added them to their contract, and thus have given them a clearness, a force, and a direction which they would not have by being trusted to the

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memory of a witness." And where a written contract appears on its face to be complete, no addition to or contradiction of its legal effect by parol stipulations, preceding or accompanying its execution, can be admitted any more than its alteration through the same means in any other respect. The law controlling the operation of a written contract becomes a part of it. (Cowen & Hill's and Edwards' Notes to Phillip on Evidence, note, 494, pp. 558, 560.) The rule here referred to, so far as it extends, is inflexible. But it has been held not to extend to collateral parol agreements or independent facts, which do not interfere with the terms of the written contract, though it may relate to the same subject-matter, and have occurred contemporaneously with, or as preliminary to the main contract in writing. (*Bas-shor v. Forbes*, 36 Md. 154; Wharton's Evidence, latter portion of § 1026, and notes thereto.) Nor does it extend to cases where there is an apparent omission or incompleteness in the contract. In such cases, what is termed suppletory matter may be supplied. This rule is recognized in the old case of *Jeffrey v. Walton*, 1 Stark. 267, referred to in said note, 494, of Cowen & Hill's and Edwards' Notes to Phillip on Evidence.

In that case, an action was brought for not taking proper care of a horse, which the defendant had hired of the plaintiff. At the time of the hiring, the following memorandum was made: "Six weeks at two guineas, William Walton, J." Lord Ellenborough held it to be a contract incomplete on its face, and only conclusive as far as it went. He admitted evidence showing that the defendant, at the time of the hiring, agreed to be responsible for all accidents, but refused to allow any evidence to be given by the plaintiff contradicting the terms expressed. This case has been referred to a great many times by the courts as authority for the exception last suggested. It is an authority, also, that it is not necessary, in order to exempt the case from the operation of the general rule, that the writing should expressly and directly rebut the presumption of completeness. Still it must be in such a shape that it may be fairly inferred from the face of it that something has been omitted therefrom. Parties are not at liberty, in such a case, to prove generally an agree-

ment made by parol, and rely upon it as a ground of recovery. They have no right to ignore the writing; though it may only be fragmentary, the proof must be confined to the matter omitted. The court in the case under consideration had no right to charge the jury in the manner it did. They should, in case the writings showed an omission, either directly or by fair inference, have been instructed to find, in reference to the matter omitted, what the parties intended to have inserted in the agreement. Their parol stipulations were of no consequence, unless they intended to include them in the writing, and inadvertently had failed to do so. But is there any apparent imperfection in the writings? Taking the several instruments between M. B. Rankin and the respondent together, and they show beyond question that the respondent was indebted to Rankin in the sum of \$2,300, which appears from the parol evidence to have been a balance due upon the sale of the farm mentioned in the writings by Rankin to the respondent; that the respondent agreed that if Rankin would receive of him certain stock, grain, and personal property, to the amount of the indebtedness, and in full payment thereof, he would guarantee to Rankin the title to the stock, grain, and personal property; that he would let him have entire control of all the proceeds of the farm, including the grain already sown, and the products of the balance of the farm, except the small lots in connection with the house, in all seven, not including the barn, but also to have the use of all farm tools on the farm and one span of horses free of charge. And he further agreed to render to Rankin his full time, and that of his son, at any labor Rankin might direct, for the term of twelve months from the ninth day of the month the writings bear date, Rankin agreeing to allow and furnish all provisions for family use respondent might need during the time. I am unable to discover any ellipsis in the agreement. It appears upon the face of it complete.

The respondent's counsel argued at the hearing that it was not, and claimed that it should be supplied with a stipulation, to the effect that the respondent should receive, as compensation for his and his son's services, \$600. The contract does not provide for any such compensation certainly, nor do the writings indicate

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that he was to receive any; the inference therefrom is that the services were to be rendered as a part of the consideration for the acquittance of the debt. The language of the instrument signed by the respondent would plainly imply that. The last clause thereof, as follows, "And I further agree to render to M. B. Rankin my full time, and the time of my son Robertes, at any labor he may direct, for the term of twelve months from the ninth day of this month," is incapable, as I view it, of any other construction. It is equivalent to saying that in addition to what he had already promised he would render the services. If the said clause of the instrument had been to the effect that respondent would render to Rankin his time, and that of his son, in accordance with their parol understanding, evidence would have been admissible to prove what that understanding was. But there is nothing on the face of the writings from which it can be inferred that they are incomplete in any particular. The respondent was particular to have Rankin sign a paper to the effect that he would allow and furnish all provisions for family use respondent might need for the twelve months, during which the labor was to be performed. Why did he neglect to have it provide compensation for his and his son's labor, if he expected to be paid therefor.

The theory that the respondent agreed in writing to render to Rankin his full time, and that of his son, for twelve months, and did not include therein the compensation he was to receive, when he expected to be paid a compensation, is unreasonable. If he had made the parol agreement he claims to have made, by which he was to be paid for his and his son's labor \$600, why did he insert the clause referred to in the writing in the form of a consideration for the relinquishment of a debt? If he had merely contracted with Rankin to furnish the labor at a stipulated price, what occasion was there for inserting in the writing what appears there in regard to the subject? In that case it would not constitute a consideration for the cancellation of the said debt; it would be an independent affair, involving a simple hiring and agreement to pay wages, and constitute no inducement for giving the receipt, acknowledging payment of the debt. The respond-

ent's counsel insists that because it was provided especially in the writing, executed by the respondent, that Rankin was to have certain things free of charge, it followed that the other matters were not to be free of charge. But I do not think that circumstance in this case argues in favor of the construction contended for. The sentence in which the exemption from charge alluded to occurs reads as follows: "But also to have the use of all farm tools now on the farm and one span of horses, free of charge." The word "also" must be regarded, and when its meaning "likewise" is considered, it puts the sentence in a different light. Likewise to have the use of the farm tools and span of horses, free of charge, may imply that the other things Rankin was to have in the transaction were to be free of charge. To have the tools, and team also, "in like manner," free of charge, does not certainly tend to show that the control of "the proceeds of the farm, including the grain already sown, and the products of the balance of the farm," and the full time of respondent and son, were not to be free of charge, any more than it does to show the contrary. But we must look to the general object which the parties had in view, as indicated by the writings, in order to determine what they intended.

The respondent was owing Rankin \$2,300 for the farm, and of course it was of great advantage to him to be able to discharge the debt by turning out stock instead of paying cash, consequently he was willing, if Rankin would take the stock in satisfaction of the debt, to do the other things enumerated in the writing. If it were apparent from the writing that respondent was to receive compensation for the labor, the writing would be incomplete, and the matter could be supplied by parol proof. But such is not the case. Upon the face of the writing it appears, inferentially at least, that the labor that was to be rendered was intended as a further consideration for the cancellation of the debt; and the proof of the parol agreement, whereby Rankin was to pay \$600 therefor, contradicted the terms of the writing. The proof was not admissible, and the Circuit Court committed error in admitting it. The rule that parol evidence cannot be admitted for such purpose is a wholesome and righteous one,

Points decided.

and should not be relaxed. It prevents fraud and perjury. We have an example of it in this case.

The respondent in his complaint in the action, which he verified by his oath, claimed \$100 for the use of the team. And at the trial he offered to testify that Rankin was to pay that sum for the use of the team, when the writing signed by him stated expressly that the use of the team was free of charge. Such recklessness deserved severe rebuke. There are other questions made by appellant's counsel as to alleged errors of the court in reference to the other counts in the complaint. If they were found to have been well taken, we would have to remand the case for a new trial. This is the second time it has been here, and I think the interest of the parties and the community demand that a quietus should be put to any further litigation of the matter. The amount of the judgment, after the \$600 for the labor is eliminated therefrom, will not be so large that the law will concern itself about it, under such circumstances as mentioned.

The judgment will be modified so as to make it \$600 less than the amount of the recovery.

STRAHAN, J., expressed no opinion in this case.

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129	363

[Filed January 19, 1888.]

MAGDALINE EGGERTH, v. CASPER EGGERTH,
RESPONDENT.

DIVORCE—FALSE ACCUSATIONS OF ADULTERY.—Such charges according to the settled law of this court entitles the injured party to a divorce.

CONDONATION—EFFECT OF.—Cohabitation after knowledge of such injury is a condonation of the offense.

CONDONATION—REPETITION OF THE OFFENSE.—Condonation is a conditional forgiveness of the offense, the condition being that the offense shall not be repeated. If repeated, the condonation is to be deemed withdrawn or avoided, and the party may rely upon the facts alleged to have been condoned.

DISTRICT ATTORNEY—PLEADING.—In a suit for a divorce, when the district attorney intervenes in behalf of the State and files a pleading therein, such pleading is governed by the same rules, so far as applicable, by which the defendant's pleading is governed.

Opinion of the Court—Strahan, J.

ANSWER—BAR TO SUIT.—To render any of the matters enumerated in subdivision 4 of section 498, Hill's Code, available as a bar to plaintiff's suit, the answer must expressly "admit the charge," and they cannot be joined in an answer which denies all of such charges.

DEMURRER—ADMISSIONS BY, NOT ENOUGH.—For the purposes of the suit, all facts well pleaded are admitted by a demurrer; but such admission is not enough under this section. The admissions required must be by answer.

APPEAL from Umatilla County. **Reversed.**

Tustin & Leasure, and Ramsey & Bingham, for Appellant.

Bailey & Ballery, for Respondent.

STRAHAN, J.—The plaintiff commenced this suit against the defendant for a divorce on the ground of cruelty. The particular acts constituting cruelty alleged in the complaint are sundry accusation of adultery against the plaintiff, which are alleged to have been false. The defendant answered the complaint, and denied the material allegations thereof; alleged condonation of the grievances mentioned. He also, by way of recriminatory charge, alleges that the plaintiff was guilty of the crime of adultery committed with one Kemper, and also with one Walpers. The reply denies the affirmative matter in the answer. The district attorney under the statute intervened and filed an answer of similar import to the one filed by the defendant, and thereafter conducted the defense in behalf of the State.

The cause being at issue, was referred to R. J. Slater, to take the evidence and report his findings of fact and law therein. The referee's findings fully sustain the allegations of the complaint; but the district attorney excepted to the same, and the court sustained the exceptions and dismissed the suit. From this decree this appeal is taken.

1. The fact that at various and sundry times the defendant made the accusations against the plaintiff alleged in the complaint, is admitted in the evidence and clearly established by the plaintiff. This, according to the settled law of this court, entitles the plaintiff to a divorce, unless her right thereto is defeated by the affirmative matters pleaded in the answers.

2. The acts of condonation relied upon are sufficient to defeat the plaintiff's right, unless the effect thereof be avoided by the

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subsequent matter relied upon by the plaintiff. Condonation is a conditional forgiveness, the condition being that the offense shall not be repeated. If the charge or offense be repeated, then the condonation is to be deemed withdrawn or avoided, and the plaintiff may avail herself of the facts alleged to have been condoned, just as if no condonation had occurred. In this case the defendant did repeat the charges after the acts of condonation, and thus barred himself of the right to rely upon them in this suit.

3. When the district attorney intervenes in behalf of the State in a suit for a divorce, and files a pleading therein, such pleading is to be governed by the same rules, so far as applicable, by which the defendant's pleading is governed. Therefore, to bar the plaintiff's suit by affirmative matter under subdivision 4 of section 498, Hill's Code, such answer must "admit the charge."

The special defenses provided for in this section are only available when the answer expressly admits the charges in the complaint (*Rice v. Rice*, 13 Or. 337), and cannot be joined in an answer which denies all of such charges. For the purposes of the suit a demurrer admits all facts which are well pleaded in the pleading demurred to; but in *Rice v. Rice*, *supra*, this court held that such admission must be by answer, and therefore a demurrer did not present the special defense in that case that the suit had not been commenced within one year after the right accrued. This view renders unavailable in this case the special matter relied upon by the defendant as well as the State.

The decree of the court below will therefore be reversed, and a decree entered here allowing the plaintiff a divorce.

Opinion of the Court—Strahan, J.

[Filed January 19, 1888.]

MARTHA JENNINGS, APPELLANT, v. JOHN W. MELDRUM, RESPONDENT.

PLEADING—EVIDENCE.—In an action to recover damages for a trespass alleged to have been committed on the south half of a certain land claim, evidence of the wrong must be confined to the particular tract of land described in the complaint.

EVIDENCE—TITLE BY ADVERSE POSSESSION.—In such case, it is not competent to prove title to another parcel of land outside of the lines of the particular donation claim, by proving an adverse possession for more than ten years next before the commencement of the suit.

EVIDENCE—PLEADING.—Where the plaintiff by her pleading limited her claim to the south half of the donation land claim of herself and husband, it is not competent to prove a trespass committed on the Rinearson donation claim, though the plaintiff may have acquired a title to the particular place where the trespass was committed by adverse possession.

APPEAL from Clackamas County. **Affirmed.**

A. L. Frazier, for Appellant.

Johnson, McCowan & Idleman, for Respondent.

STRAHAN, J.—This is an action to recover damages for an alleged trespass committed on 293.06 acres of land in Clackamas County, being the donation land claim of Berryman Jennings and Martha Jennings, his wife; the south half of said donation land claim having been duly set apart by the proper authorities of the United States to this plaintiff, said dividing line bearing north 65 degrees east; the north half being allotted to Berryman Jennings, and the south half to the plaintiff. The answer denied the allegations of the complaint, and then pleaded title to the *locus in quo* in the wife of the defendant Georgia P. Meldrum, and that the same was a part of the donation land claim of Peter M. Rinearson and wife, which adjoins the donation land claim of Jennings and wife on the south. The reply denied that said premises were a part of the Rinearson donation land claim, and repeated that it was a part of the Jennings donation land claim, and then alleged that the plaintiff had “been in the actual, adverse, and exclusive possession of the *farm* from the year 1851 until the time she was dispossessed by the defendant, as set forth in the complaint.”

Upon the trial the defendant had a judgment in his favor, from which the plaintiff has appealed, and assigned various errors; but these errors all relate to the rulings of the court in excluding evidence designed to prove an adverse possession for more than ten years, and the refusal of the court to give to the jury the instructions asked by the plaintiff on that subject. The plaintiff to sustain the issues on her part read to the jury without objections her patent to the donation land claim of B. Jennings and wife, and then gave evidence tending to prove that the exterior lines described in the patent included the *locus in quo*. The defendant, on his part, introduced evidence tending to prove that the alleged trespass was committed at a place within the exterior lines of the Rinearson donation land claim. The plaintiff's counsel asked Colonel Jennings a question as to the adverse possession of the *locus in quo* by the plaintiff, and also asked the court to instruct the jury on the same subject, all of which were refused by the court, to which exceptions were duly taken. These exceptions cannot be sustained, for the reason that the plaintiff has, by her pleadings, limited her claim to the south half of the donation land claim of herself and husband, and even though the plaintiff might be able to prove title to a portion of the Rinearson donation claim acquired by adverse possession, she had precluded herself from doing so by her pleadings.

By her complaint, the inquiry is expressly limited to the south half of the donation claim of herself and husband, thus making the contention practically one of boundary. If the plaintiff had described the *locus in quo* in her complaint, and averred title in herself, and the wrong committed by the defendant, there is no doubt her title might have been established by showing an adverse possession for ten years or more. But it was not competent to prove title to land not described in the complaint by showing an adverse possession for the time required by the statute, or otherwise. Such evidence was not relevant to the issue. If the *locus in quo* was within the exterior lines of the Jennings donation claim, the plaintiff proved a perfect title thereto by the production of her patent; if without

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those lines, the evidence was irrelevant, so that, in any event, the court did not err in excluding it.

The instructions asked were properly refused for the same reasons. There was therefore no error committed by the court below in the trial of this cause, and its judgment must be affirmed.

[Filed January 28, 1888.]

R. G. THOMPSON ET AL., RESPONDENTS, v. D. COFFMAN, ET AL., APPELLANTS.

BUILDING CONTRACT—BREACH.—Where by the terms of a building contract the contractor bound himself to “promptly pay, or cause to be paid, for all materials used by him under this contract, and for all labor and mechanical workmanship performed and executed in the construction and completion” of such building; *held*, that a failure to promptly pay or cause to be paid for any such work or materials constituted a breach of such contract.

CONTRACT—PARTIES NOT NAMED IN.—Where the contract did not name C. or N. as parties, but they signed their names thereto after G.’s signature, who was mentioned as a party, and then T. and F. signed it; *held*, that C. and N. thereby made themselves parties to the contract as sureties for G.

SURETIES—PAROL EVIDENCE.—In an action upon a written contract, it may be alleged and proven, when necessary, that one or more of such parties signed said contract as surety.

APPEAL from Umatilla County. Affirmed.

Wager & Skipworth, for Appellants.

Cox & Minor, and *Cox, Smith & Teal*, for Respondents.

STRAHAN, J.—This is an action to recover damages for a breach of a building contract, signed by J. J. Goble, as principal, and D. Coffman and Thomas Nye, as sureties. It appears from the complaint that on the fourteenth day of June, 1886, the plaintiffs entered into a contract with J. J. Goble, who agreed to furnish all of the materials except brick, and perform all the work and labor in the erection of a certain building in Pendleton, Oregon, for which the plaintiffs were to pay \$6,460, to be paid in various amounts as the work progressed. To secure the faithful performance of said contract on the part of said Goble, the agreement sued on was executed. Said agreement contains, amongst

15	631
18	114
16*	713
22*	647

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other provisions, the following: "Said party of the first part further agrees that he will promptly pay, or cause to be paid, for all materials used by him under this contract, and all labor and mechanical workmanship performed and executed in the construction and completion thereof; and that contemporaneously with the execution of this contract, he will enter into a bond in amount equal to entire cost of building, with sureties satisfactory to the parties of the second part, in which they shall bind themselves to pay all claims for labor and materials used upon said work, in such time as to prevent any liens accruing against said work or building, and to hold said parties of the second part harmless against any such claims or lien." The complaint assigns as breaches of this part of the contract that defendants did not pay all claims for labor or materials used upon said building; nor was any other bond executed to the plaintiffs to secure them against default on the part of the defendants in performing the covenants of said contract; but that of claims justly incurred for labor and materials used upon said building, the defendants utterly failed and neglected to pay divers thereof, amounting to the sum of \$1,473.71, which amounts these plaintiffs were compelled to pay, and did thereafter pay for items too numerous to be therein particularly set forth, on or before the fifteenth day of November, 1886.

Judgment appears to have been taken against Nye for want of an answer. Goble and Coffman demurred to the complaint, but their demurrer being overruled, they filed separate answers. Coffman's denial controverts the alleged breaches. Goble's goes further, and in addition to controverting the breaches alleged in the complaint, it alleges the making of the agreement, that he kept and performed the same on his part, in every particular, and that the building was duly accepted by the plaintiffs. The answer contains the further allegation that plaintiffs have neglected and omitted to pay said defendants \$2,088.23 of the contract price for erecting said building. The reply denied the new matter in the answer. A trial before a jury in the court below resulted in a verdict and judgment in favor of the plaintiffs, from which this appeal is taken.

Numerous errors are assigned in the notice of appeal; but we are relieved of the necessity of noticing any of said alleged errors, other than those arising on the matters of evidence connected with the alleged breaches of said contract by the defendants. No part of the charge of the court to the jury appears in the bill of exceptions, and it must therefore be presumed upon this appeal that such charge was in every particular correct. The fact that it was lost, and for that reason does not appear, gives rise to no implication that it was erroneous.

1. The error principally relied upon by the appellants is that no breach of the conditions or covenants by the defendants is shown. That to constitute such breach, for which Coffman, a surety, can be held liable, it must be made to appear that claims existed for labor and materials used in the erection of said building; that Goble neglected to pay such claims; and that such steps were thereupon taken under the statute as to perfect said liens against such building. That as against the defendant Coffman particularly, if the plaintiffs paid any claims until all of this had been done, such payments were voluntary on the part of the plaintiffs, and that such facts would not constitute a breach of said contract. The case most relied upon by the appellant to sustain his contention is *Simonson v. Thori*, 31 N. W. Rep. 861. In that case the agreement provided that the contractors "would protect said Grant, and save him harmless from all claims and liens for labor and materials contracted by them on said buildings." The contract under consideration required more than this; by its terms the contractor was bound to "promptly pay, or cause to be paid, for all materials used by him under this contract, and all labor and mechanical workmanship performed and executed in the construction and completion" of said building. The part of said writing which refers to the accrual of liens, and the saving of the party of the "second part harmless against any such claims or liens," refers entirely to what was agreed to be inserted in the additional agreement, but which was never executed. The agreement sued on is, undoubtedly, broader in its terms, and more comprehensive in its scope and meaning than the additional agreement which is provided for therein; and

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inasmuch as the contractor elected not to execute the additional agreement which he obliged himself to do, this one must be taken as the measure of the duties and responsibilities of the parties to it. The omission, then, of the contractor under the very terms of the agreement to promptly pay for all materials used by him in the erection of the building, or for all labor or workmanship in the construction thereof, constituted a breach of said agreement, without any question as to whether said claims had become liens on the building or not. It is not disputed but what the materials and labor represented by the amount for which a recovery was had were such as are contemplated by the contract, and for which Goble bound himself to "promptly pay"; or if it were controverted, it is conclusively settled by the verdict, so that the case, in any view, is brought within the terms of the contract declared upon.

2. *Parties to contract.* Counsel for the appellant insisted upon the argument here that the contract set up in the complaint failed to show any liability on the part of the defendant Coffman; that he was in no sense a party to it; that it purported to be a contract between Goble on the one hand and Thompson and Flack on the other; and that it was of such a nature that Coffman could not become a party either as principal or surety by merely signing his name. It is true that the contract does not name Coffman or Nye as parties. They simply signed their names to the writing after Goble's, which writing does not otherwise appear to be their contract; and their signatures are followed by the names of the other parties mentioned in said agreement. This objection presents the simple question, whether or not such signing made them parties to the agreement, and we are of the opinion it did. In *Thomas v. Gumaer*, 7 Wend. 43, it was held that where an agreement between two persons, perfect in all respects as between them as the *sole contracting parties*, was signed by them and a third person, who added the words "as security" to his name, and in the agreement was contained a clause "we bind ourselves," etc., it was held that the third person, being the second signer, was the surety of the first signer, and was jointly bound with him to perform the stipulation of the contract. So in

Points decided.

Ex parte Fulton, 7 Cowen, 484, where an appeal bond did not contain the name of the surety in the body of the bond anywhere, but he signed and sealed it, it was held that such bond was valid and binding on the surety. And to the like effect is *Sheid v. Leibshultz*, 51 Ind. 38; *Belloni v. Freeborn*, 63 N. Y. 383.

3. It is alleged in the complaint that Coffman and Nye signed said writing as sureties for Goble. Within the rule announced in *Thomas v. Gumaer*, *supra*, the place where they placed their signatures would fix their relations to the parties; but without that, and where the capacity in which parties sign an agreement does not otherwise appear, it may be alleged, and proven by parol. (Brandt on Suretyship, § 17.) This construction is more favorable to the surety ordinarily than to treat him as a principal, for the reason that in many cases, such as the modification of the agreement with his principal without his consent, laches, and the like, he may be entitled to his discharge; but in this case no such conditions are shown to exist, and the liability of the surety is co-extensive with that of the principal, under the terms of the agreement described in the complaint.

4. There are some other assignments of error in the notice of appeal, but they were not specially insisted upon at the argument, and they do not seem to be of such importance as to require special discussion. We have examined them, however, and do not find that any of them can be sustained.

The judgment of the court below must therefore be affirmed.

[Filed January 30, 1888.]

W. E. MOORE, APPELLANT, v. JACOB FRAZER,
RESPONDENT.

PURCHASER AT FORECLOSURE SALE—EVIDENCE.—The title of a purchaser at a foreclosure sale, who is a stranger to the decree, may be proven by the decree the order confirming the sale, and the sheriff's deed.

PLEADING—EVIDENCE—VARIANCE.—An allegation of a purchaser at a foreclosure sale that the mortgage was given to the board of commissioners for the sale of school lands, etc., and thereafter foreclosed, is sustained by proving a decree in favor of the State of Oregon foreclosing the same mortgage, and such variance is not material.

Opinion of the Court—Strahan, J.

EQUITABLE ESTOPPEL—LEGAL TITLE.—In an action at law to recover possession of real property, an equitable estoppel cannot prevail against the legal title. The equity could only be brought before the court in such case by cross-bill, as provided in section 331 of Hill's Code.

APPEAL from Umatilla County. Affirmed.

Tustin & Leasure, and *Ramsey & Bingham*, for Appellant.

Bailey & Ballery, and *Cox & Minor*, for Respondent.

STRAHAN, J.—This is an action of ejectment, brought to recover certain real property situate in the city of Pendleton. Both parties claim title through James M. Moore, the plaintiff by quit-claim deed dated October 30, 1886, and duly recorded in said county of Umatilla on November 1, 1886. The defendant claims through a decree of foreclosure of a mortgage, which decree was entered by default in the Circuit Court of Umatilla County, Oregon, on the twenty-third day of October, 1876. The mortgage alleged to have been foreclosed by this decree was dated October 27, 1871, and made by James M. Moore and wife to the board of commissioners for the sale of school lands and the management of the common school fund, to secure the payment of a note for six hundred dollars, money borrowed from said board by Moore. The mortgage covers the lots in controversy in this action. It seemed to be conceded upon the argument that if the decree of foreclosure was sufficient, and that said mortgage was foreclosed by said proceeding, the defendant through mesne conveyances has succeeded to all the interest James M. Moore had in said premises at the time of the execution of said mortgage. This state of the record presents the question, what must a stranger to a decree who purchases real property sold by virtue thereof prove in order to sustain his title to such property.

1. The general rule in such case is that the purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the officer. (*Phillips v. Coffee*, 17 Ill. 154.) By the statute of this State, and the practice under it, this rule is modified in two particulars: *First*, the sale must be confirmed before the deed can be

executed; and *second*, in case of foreclosure proceedings, no levy is necessary. The execution in such case is special, and directs the sale of the particular property, so that the title of the purchaser takes effect by relation as of the date of the mortgage against all parties to the suit, thus defeating all intermediate conveyances and encumbrances. So it was said in *Cloud v. El Dorado Co.* 12 Cal. 128, the purchaser rests for title upon the judgment, execution, levy, sale, and deed, and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold; and the same rule is announced in *Clark v. Lockwood*, 21 Cal. 220. In *Biddle v. Bush*, 27 Tex. 675, it is said that a purchaser at a sheriff's sale is bound to show only a valid judgment, execution, and sheriff's deed; and although the levy be shown by the execution to have been defective, that is but an irregularity of the officer, which will not defeat the title of the purchaser if he is otherwise without fault. So it was said in *Carpenter v. Doe*, 2 Ind. 465, that a purchaser at a sheriff's sale is bound only to show the judgment of a competent court, an execution warranted by the judgment, and a sale and deed under it. And the same principle is stated in *Crane v. Hardy*, 1 Mich. 56; *Shafer v. Bolander*, 4 Iowa, 201; *Griffith v. Bogert*, 18 How. 158; *Laudes v. Perkins*, 12 Mo. 329; *Butterfield v. Walsh*, 21 Iowa, 97; *Yates v. St. John*, 12 Wend. 74.

2. But counsel for appellant further claim that inasmuch as the defendant has, by his answer, in addition to pleading title in himself, gone further and undertaken to set out how he derails title, he is bound to prove a title derailed in the particular manner alleged in his separate answer. All of this separate answer was redundant. It states, in effect, that James M. Moore was the owner of the property in controversy on the 27th of October, 1871; that he borrowed of the common school fund from the State six hundred dollars, and that on said day he executed and delivered to the board of commissioners for the sale of school lands and the management of the common school fund a mortgage covering said property; that said mortgage was duly foreclosed by suit, and the property sold on an execution

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issued on said decree, from which source the defendant derived title through mesne conveyances. The decree offered in evidence was one given in a suit wherein the State of Oregon was the plaintiff and the said James M. Moore and wife were the defendants, foreclosing the said mortgage. The plaintiff objected to this decree, but his objections were overruled, and an exception taken. Counsel for appellant contend that this decree does not tend to prove the allegations contained in the separate answer of defendant, showing how his title was derived; that to sustain his allegations, the defendant must produce a decree in a suit brought in the name of the board of commissioners, to whom said note and mortgage were made payable, foreclosing said mortgage. It will be observed that the defendant's answer does not allege in *whose name* said suit was prosecuted.

The practice in such foreclosure suits does not seem to have been uniform. Sometimes these suits have been brought in the name of the State (*Ison's Appeal*, 6 Or. 465); in other cases they were prosecuted, not in the name of the State (*Hazard's Appeal*, 9 Or. 366), but presumptively in the names of the persons composing the board in their official capacity. But in either event, the legal effect of the proceedings would be the same; the mortgage would be foreclosed, and a sale under the decree would divest all interest of the mortgagor and transfer it to the purchaser. The supposed variance, if it existed, would not be material. The plaintiff could not have been misled by it, nor did he allege that he had been so misled, nor did he offer any proof on that subject. Had he made the necessary proof on the subject in the court below, that court would have ordered the pleading to be amended on such terms as would have been just. In the absence of such proof, it was the duty of the court to treat the alleged variance as immaterial. (Code, § 96.) But when the defendant pleaded title in himself, he did all that was necessary for him to do. (Code, § 319.) All beyond that was redundancy, and no doubt would have been stricken out by the court on motion. It was only repeating in another form what had been already fully presented in the preceding part of the answer. It was an attempt to plead the evidence which the

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pleader considered tended to prove plaintiff's title. But there is still another conclusive answer to the plaintiff's exception on this point. If the mortgage were excluded, there is still enough remaining to establish the defendant's title under the rule previously stated. The decree in favor of the State was for the recovery of money, and it took effect upon the interest of James M. Moore in the real estate in controversy from the time it was docketed, and an execution issued on said decree, and a sale by virtue thereof, would vest in the purchaser all the interest the defendant therein then had in said property, without regard to the mortgage. In no view of the subject, therefore, is there any ground for the plaintiff's contention.

3. We have not found it necessary to consider the doctrine of *equitable estoppel*, as sought to be applied by the defendant in this case, further than to say that the same could not be made available in a court of law to defeat a purely legal title. To enable the court to consider a purely equitable title, or any facts which in equity subordinate a legal title, and give the defendant the better right by reason of his superior equity, the same must be brought before the court by cross-bill, as provided in section 381 of the Code. This the defendant did not do, nor was it necessary. His defense was complete at law.

These conclusions are decisive of every question in this case, and require an affirmance of the judgment of the court below, and it is so ordered.

[Filed January 30, 1888.]

MARY J. MOONEY, RESPONDENT, v. GEORGE W.
HOLCOMB, APPELLANT.

EVIDENCE, BEST—WHEN PRODUCED.—Where the evidence offered clearly established the mistake alleged, and was uncontradicted, and the record disclosed this to have been admitted by the original parties to the transaction, *held*, that the failure to call such parties as witnesses did not infringe the rule that the best evidence must be produced.

APPEAL from Clackamas County. Affirmed.

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Opinion of the Court—Lord, C. J.

C. D. & D. C. Latourette, for Appellant.

Johnson, McCowan & Idleman, for Respondent.

LORD, C. J.—This is a suit to reform certain deeds, on the ground of mistake in the description. The facts are stated in *Holcomb v. Mooney*, 13 Or. 503, and for the purposes of this case it is not necessary to restate them. The only dispute is as to the true course of the line between the two tracts of land. The deeds all mention the line as south 65 degrees east, when the plaintiff claims that the line should be 55 degrees east, which would include the tract of land in controversy. It is not disputed but that the evidence which preceded the execution of the deeds showed that the parties intended to convey and receive the identical land which is the subject-matter of this litigation, and that the description in the deeds does not conform to the original memorandum furnished for the purpose of properly describing the property; nor does there seem to be any room for controversy on this point. Looking at the evidence, it is beyond doubt that the line actually run and surveyed is as alleged, and included the *locus in quo*.

The mistake arose out of the original deed given by Miss Paddock to her sister Mrs. Dedman, and the only real question here is whether it conforms to the intentions of the parties. It seems, however, that Miss Paddock did not testify at the trial, or her sister, and the counsel claims because of the failure to produce them and require them to testify that there was in this circumstance the holding back of evidence which raises a presumption against the plaintiff. He assumes that the testimony of these parties as to the property intended to be conveyed would be the higher evidence, and that their failure to testify raises the presumption of our statute that such "higher evidence would be adverse from the inferior being produced." (Hill's Code, subd. 6, § 776.) Now the record discloses that Miss Paddock admitted the mistake in her deed, and made no defense, and the same is true as to Mrs. Dedman; that the surveyor at their instance and for the purpose of furnishing a description of the land to be conveyed, actually run the line as alleged, aided and assisted by the

husband of Mrs. Dedman, and made a memorandum thereof, to be used by the scrivener who should write the deed; that the scrivener drew the deed at his office, and did not incorporate the description as given to him, but by some inadvertence or oversight made the mistake referred to. And what is more, both parties acted upon, took possession of, and held the lands, not according to the mistaken description in the deed, but as they intended and supposed had been conveyed as given in the memorandum. One built a house upon the disputed tract, and in sight of the residence of the other party; and all the acts done after the execution of the deed and circumstances connected therewith are irreconcilable with the description in the deed, and show more plainly and decisively what the parties understood and meant to convey and receive than any mere declaration of the parties as to their intentions.

Acts are often more decisive of the intent, or what was supposed to have been intended, than any declarations could possibly effect; and here, not only what preceded, but what followed the execution of the deed are only consistent with including the land in dispute in such description. There is not an iota of testimony to the contrary, nor is the testimony given involved in any doubt that the description as alleged is not the true description, nor is it disputed but what the proof shows that the line run by the surveyor is the line intended to be the one used in such description. It is only said, while your evidence shows there was a mistake, and we have no testimony to contradict it, no matter how well the judicial mind may be satisfied of its truth, yet unless Miss Paddock will come on the witness-stand and swear that there was such a mistake, then the evidence is worthless by reason of the presumption evoked. As we have shown, the record taken in all its parts shows this as conclusively as it is possible for evidence to do, and that much of it was a part of the transaction itself, and was not a substitution of inferior evidence, or even a selection of weaker instead of stronger proof; which is said not to be an infringement of the rule that the best evidence must be produced.

It is admitted that the non-production of evidence clearly

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within the power of a party creates a strong presumption that, if produced, it would be against him. Our Code provides, "that if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be reviewed with distrust." (Hill's Code, § 845, subd. 7.) But that is not this case, much less the presumption invoked by the subdivision of the section cited by counsel and already referred to.

The decree must be affirmed.

[Filed January 31, 1888.]

J. Q. SHIRLEY, RESPONDENT, v. CHARLES GOOD-
NOUGH ET AL., APPELLANTS.

ACCOUNT—PARTIES LIABLE TO. — Partners, joint tenants, and tenants in common are all bound to account with each other in relation to the common or joint property.

COSTS—FUND IN COURT. — When the parties acted in good faith, and the suit involved the settlement of accounts and the disposition of property in which they were all interested, the costs were directed to be paid out of the fund in court.

APPEAL from Union County. Affirmed.

R. Eakin, and *L. B. Cox*, for Appellants.

Baker, Shelton & Baker, and *Ramsey & Bingham*, for Respondent.

STRAHAN, J.—The object of this suit is for an accounting between the parties as partners, and for the dissolution of said alleged partnership and the settlement of its affairs. The plaintiff alleges in substance that in April, 1884, he was the owner of a stallion called "Iron Duke," of the value of \$1,200, and at said time sold one fourth thereof to each of the defendants, and that they then entered into an agreement to keep said horse as partners, sharing the profits and losses according to the respective interests in the property. The complaint shows that the busi-

ness of the firm extended during the seasons of 1884 and 1885, and that large profits accrued to said firm in the course of said business. Each of the defendants answered separately, denying the existence of any partnership, and alleging that each of them purchased a one-fourth interest in "Iron Duke" for their own use, and thereby became joint owners with the plaintiff; but that "Iron Duke" might extend his jurisdiction beyond the pastures of his owners, and that in each instance of that kind a charge of \$25 should be made. That in April, 1886, the plaintiff, unlawfully and wrongfully, and without appellant's consent, took "Iron Duke" away from Goodnough's ranch and removed him from the State, and kept him away during the season of 1886, to the damage of Goodnough in the sum of \$250 and of Halley in the sum of \$500. The new matter in the answers was denied by the replies. The cause was then referred to T. H. Crawford, Esq., to take the evidence and report the same to the court with his findings of facts and law, which report was in all things approved and confirmed by the court, and a decree entered thereon in favor of the plaintiff and against Goodnough for \$332.70, and against Halley for \$374.95, from which decree both defendants have appealed.

The evidence submitted leaves the question in some doubt whether these parties were partners in the business described in the complaint, or were simply tenants in common in "Iron Duke"; but I do not deem this circumstance material. They are bound to account with each other, whether they were partners, joint tenants, or tenants in common. (1 Story's Equity Jurisdiction, § 466; *Dyckman v. Valiente*, 42 N. Y. 549; *Earley v. Friend*, 16 Gratt. 21; *Wright v. Wright*, 13 Allen, 207; *Goodnow v. Ewer*, 16 Cal. 461; *Darden v. Cooper*, 7 Jones, 201.) This view of the law disposes of the principal contention of the appellants in this court. My first impression was to exclude from the account the plaintiff's charges for expenses incurred in taking "Iron Duke" to Montana and return; but a careful re-examination of the evidence satisfies me that the defendants assented to it, and if they did they ought to bear their proportion of the necessary expenditure.

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The decree will therefore be affirmed; but inasmuch as the parties all seem to have acted in good faith in this case, and the suit involves the settlement of accounts and the disposition of property in which they are all interested, we have concluded to direct that neither party shall recover costs against the other, but that the costs and disbursements of the suit shall be paid out of the fund in court before the same is divided.

[Filed January 31, 1883.]

JESSIE SOVERN, ADM'R, APPELLANT, v. S. M. YORAN,
RESPONDENT.

NONSUIT—WHEN IMPROPERLY GRANTED.—In an action by an administrator for money discovered by the respondent concealed under an old barn, which money had been by the respondent treated as *lost property*, and it was proven on the trial that appellant's intestate was possessed of money shortly before her death, corresponding in amount to that found; that she was in the habit of concealing her money; that no money was found about her premises; that she attempted to tell her daughter something about money, but was too far exhausted to make herself clearly understood; *held*, that sufficient proof was adduced to submit the question to the jury, whether the money was in fact the money of the appellant's intestate; and *held, further*, that a nonsuit on motion of the respondent was improperly granted.

APPEAL from Lane County. Reversed.

Weatherford & Blackburn, and *L. Bilyeu*, for Appellant.

G. B. Dorris, for Respondent.

THAYER, J.—The appellant, as administrator of Joannah Goodchild, commenced an action in said Circuit Court against the respondent to recover \$926.85, alleged in his complaint as belonging to the said estate, which had gone into the possession of the respondent and been converted by him. The respondent denied the material allegations of the complaint, and set up as a further defense the following: "That on the twenty-second day of March, 1884, upon the premises owned and occupied by defendant, one Hugh Gray found one purse of money amounting to the sum of \$926.85, and one Darwin E. Yoran found one

15 644
16 271
15* 395

15 644
46 242

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purse of money amounting to the sum of \$1,000; that the said Hugh Gray and Darwin E. Yoran delivered the said two packages of money to this defendant to be disposed of according to law, and subject to their claim as such finders; that this defendant as such holder of said money, in compliance with title 2, of chapter 18, of the General Laws of Oregon, did, on the twenty-fourth day of March, 1884, give notice in writing to the clerk of Lane County, Oregon, of such finding; did also on said day cause a similar notice to be posted up in two public places in said county, as follows: One at the court-house and one at the postoffice in Eugene City, Oregon; did also publish a notice of such, printed in the Oregon State Journal, a newspaper published weekly in said county for ——— weeks in succession, the first insertion thereof being on the ——— day of March, 1884; that no owner appeared within one year from the date of such notice and claimed said sums of money; that on the twenty-fifth day of March, 1885, and before any notice was given to the said defendant of any claim to said money, and before the commencement of this action, defendant did, in compliance with the aforesaid statute of Oregon, deliver to B. H. James, county treasurer of said Lane County, Oregon, the sum of \$961.85, being one half the value of the aforesaid \$1,926.85, less the sum of two dollars, paid for publishing said notice; that said defendant did at the same time deliver to the said Hugh Gray, aforesaid, the sum of \$462.90, and did deliver to the said Darwin E. Yoran the sum of \$499.50; that the said sums of money were delivered to this defendant as bailee by said finders, and the same, or that portion to which each was entitled under the aforesaid law, was delivered to the aforesaid finders and paid over to said treasurer of Lane County, Oregon, before demand was made, or this action commenced."

The appellant filed a motion to strike out the further defense, which the court denied, and he thereupon filed a demurrer thereto, and the court overruled that. He then filed a reply denying it, and in which he alleged that the decedent, in her lifetime, placed said two purses of money mentioned in the answer on the premises therein mentioned for safe-keeping, and

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that she owned said purses at said time, or was lawfully in possession thereof, and that said purses were never at any time lost. Upon the trial by jury the appellant gave evidence that the decedent, at the time of her death, occupied the premises upon which the money was found; that she had money corresponding in amount with the money found; that she was accustomed to secrete her money about the premises; that at the time of her death no money was found upon her, or within her immediate possession, except about \$2.50; that while dying she attempted to tell her daughter, Mrs. Ralston, something about money, and indicated that it was secreted, but was too weak to state intelligently regarding it; that the money was found under the floor of the barn upon the premises; that a piece of plank constituting a part of the floor in the corner of the barn was lifted up, and the money was found there in purses, that were in two separate cans, which evidently had been placed there for safe-keeping by some one. Upon submission of the appellant's testimony, the court upon motion of the respondent's counsel granted a nonsuit, and entered the judgment appealed from. This ruling is claimed by the appellant's counsel to have been erroneous, and in my opinion it was.

The testimony and circumstances tended to prove that the money belonged to the deceased at the time of her death, and that the respondent had reason to believe that such was the fact. She had been in the occupation of the premises where it was discovered, and it had unquestionably been left at the place where it was found intentionally. It was certainly his duty to make suitable inquiry before claiming that it was lost money. The evidence should have been submitted to the jury, and if they had found a verdict thereon, it would have been upheld.

The judgment should be reversed, and the case remanded for a new trial.

STRAHAN, J., was an attorney in the first trial of this case in the lower court, and did not sit in the case *here*.

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2. **CHATTEL MORTGAGE—JURISDICTION—TRUST.** — The necessity of taking an account, and the matter of trust and confidence between the parties, are sufficient to give a court of equity jurisdiction of the suit, and the real estate mortgage is so connected with the transaction that it could not be separated from the chattel mortgage. — *Paul v. Land*, 442.
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1. **LEASE, UNRECORDED — NOTICE OF TERMS OF.** — A lessee of a cigar store in a building which contained, also, a saloon separate from the cigar store, who by the terms of his lease had the exclusive privilege of selling cigars and tobacco in the saloon, gave notice at a sheriff's sale by an attaching creditor of his lessor, prior to the sale, but subsequent to the levy of the attachment, that he had a sublease of the cigar store. *Held*, (1) That when he stated that he had a sublease of the cigar store, the purchaser had the right to accept his statement, and was not bound to inquire further into the terms or extent of the lease. (2) It was immaterial, when he undertook to state what the lease was, whether or not the contract was in writing. (3) That it could not be inferred from his statement that he had a lease of the cigar store; that the lease extended to other parts of the building, and the purchaser was not thereby put upon inquiry as to other parts. (4) That it was misleading to instruct the jury in such case that when a party gives notice that his contract was in writing, "that was notice of all that

ATTACHMENT (Continued).

- the writing contained," and that if the purchaser or his agent had been notified at the time of the sale that there was a lease, and had reasonable grounds to believe that it was in writing, they were bound to inquire into the contents of the lease, and the law bound them by its contents. — *Dickey v. Henarie*, 351.
2. IMPLIED NOTICE — DUTY OF COURT TO INSTRUCT AS TO. — It is error for a court to submit to the jury, as a question of fact, "what a reasonable or prudent man would have done towards finding out the rights of the sub-lessee." The duty of the judge was to tell the jury what the duty of the purchaser was, in case they found that he had notice of the rights of the sub-lessee. — *Id.*
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2. INSTRUCTIONS — EXCEPTIONS TO. — Where the charge consisted of several pages of type-writing matter, and appended to it was a note to the effect that counsel excepted to that portion enclosed in italics, held, that this might answer as a memorandum of the parts of the charge excepted to, but was not sufficient under section 230 of the Civil Code as a statement of the exceptions. — *Id.*
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BILL OF EXCEPTIONS (Continued).

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6. **BUILDING CONTRACT—BREACH.**—Where by the terms of a building contract the contractor bound himself to "promptly pay, or cause to be paid, for all materials used by him under this contract, and for all labor and mechanical workmanship performed and executed in the construction and completion" of such building; *held*, that a failure to promptly pay or cause to be paid for any such work or materials constituted a breach of such contract.—*Thompson v. Coffman*, 631.
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4. **SAME.**—Where the pledgor cast the vote of such stock and it was refused by the president, who was by the by-laws the inspector of elections of directors, and the president certified to the election of other persons than those voted for by the pledgor; *held*, that the votes should be counted as cast by the pledgor, and that the persons for whom he voted were the elected directors; that the votes, when cast, and not the certificate of the inspector, constituted the election; that the election was not affected by proceedings had at the stockholders' meeting after the president of the meeting had declared the same adjourned.—*Id.*
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6. **DIRECTORS.**—A *bona fide* owner of shares of stock is qualified to be a director, although the transfer has not been registered on the books of the company as provided by the by-laws.—*Id.*
7. **DIRECTORS, RESIDENCE OF.**—Where the objects of the corporation, as expressed by the charter, are to build and construct "railroads, canals," etc., and the corporation has already done so to a limited extent, the court will not inquire into the length, extent, or magnitude of the canals or roads in order to ascertain whether a non-resident of the State is qualified to be a director of such corporation, under the statute allowing non-residents to constitute a minority of the board of directors of corporations engaged in the construction or operation of railroads, canals, etc.—*Id.*
8. **BOARD OF DIRECTORS—IRREGULAR PROCEEDINGS OF.**—Where a number of directors immediately after their election, which was contested and disputed by the president of the corporation, proceeded in his absence, and without any notification to him—he being a member of the board—to organize and elect a president, *held*, that the proceedings were irregular and void, and were not remedied by a subsequent action of the board ratifying and confirming the irregular proceedings. (By LORD, C. J., dissenting.)—*Id.*
9. **RIGHTS OF PLEDGEE OF STOCK.**—Stock having been assigned by S. to R., coupled with an irrevocable power of attorney authorizing R. to transfer the shares to his own name, R. had the right so to do before default was made in the payment

CORPORATIONS (Continued).

- of the note, and R. can vote such shares as are incident of such holding while they stand in his name and the debt is unpaid. — *Id.*
10. CORPORATION—STOCK—"CALLS."—The board of directors of a private corporation may make "calls" upon stock without stating in their proceedings that such "calls" are for a corporate purpose, or that the business of such corporation required that such subscriptions should be paid. — *Budd v. Multnomah St. Ry. Co.*, 413.
 11. DIRECTORS—POWERS OF CORPORATION.—Under section 3225 of Hill's Code, the power to make "calls" upon stock is one of the "powers" vested in the corporation, and to be exercised by the board of directors from and after their first meeting. — *Id.*
 12. "CALL"—HOW MADE.—All that is necessary is that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part or all the unpaid subscription. — *Id.*
 13. SAME—STOCKHOLDERS CANNOT QUESTION.—The necessity of the "call" is not open to question by the stockholders. The determination of that question is for the board of directors. — *Id.*
 14. CORPORATION—FORFEITURE OF STOCK—STATUTE.—A corporation has no inherent power to forfeit or sell the shares of stock held by a delinquent stockholder. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute. — *Id.*
 15. BY-LAW FOR SALE OF STOCK FOR DELINQUENT ASSESSMENTS.—Subdivision 6 of section 3221 of Hill's Code confers upon private corporations power to make by-laws for the sale of any portion of its stock for unpaid assessments thereon; but such by-laws must "not be inconsistent with any existing law." — *Id.*
 16. BY-LAW—MUST BE GENERAL AND UNIFORM.—A resolution directed against the stock of a particular stockholder named is not a by-law. A by-law to be reasonable ought to be general; it ought to affect every delinquent subscriber and all delinquent stock alike, and it ought to be directed against all within the sphere of its operation. — *Id.*

See ATTORNEY AND CLIENT; ESTOPPEL.

COSTS.

1. COSTS—UPON JUDGMENT BY STIPULATION.—Costs are an incident of the judgment, and where parties stipulate that a plaintiff may take judgment against the defendant, plaintiff will be entitled to costs. — *Stewart v. Corbus*, 68.
2. COSTS—FUND IN COURT.—When the parties acted in good faith, and the suit involved the settlement of accounts and the disposition of property in which they were all interested, the costs were directed to be paid out of the fund in court. — *Shirley v. Goodnough*, 642.
3. PRACTICE—COSTS ON APPEAL.—The prevailing party is entitled to costs in this court in equity cases, unless equitable considerations arising out of the facts of the particular case should render a different rule necessary. — *Miller v. Tobin*, 595.
4. UNDERTAKING—LIABILITY OF SURETIES FOR COSTS.—A surety in an undertaking, "for the payment of such sum as may from any cause be adjudged against the plaintiff," is liable for the costs of the action. (Following *Carlton v. Dixon*, 14 Or. 294.) — *Jordan v. La Vine*, 329.
5. COSTS—SECTION 549 OF HILL'S CODE.—Costs are allowed, of course, to the plaintiff upon a judgment in his favor; but if in such action he recover property or the value as established on the trial, and damages for detention, in all less than fifty dollars, he shall recover no more costs and disbursements than the sum of such value and damages. — *Phipps v. Tylor*, 494.

COSTS (Continued).

6. JUDGMENT IN, AS TO COSTS IN CRIMINAL CASE.—A judgment of a justice of the peace, that a defendant convicted of a petty offense pay a fine of thirty dollars and costs, taxed at fifty-four dollars, and that in default he be imprisoned until such fine and costs are paid, not exceeding forty-two days, is without warrant of law. (Overruling *State v. Crowley*, 11 Or. 512.)—*State v. Sheppard*, 598.

COTENANCY. See ACCOUNT, 1.

COUNTER-CLAIM.

1. COUNTER-CLAIM, WHAT IS.—In an action upon a contract for money expended by a tenant in repairing a hotel, the owner of the building may defend by showing that the building was burned in consequence of the carelessness of the tenant.—*Zigler v. McClellan*, 499.
2. EVIDENCE.—It is reversible error to exclude testimony tending to establish that fact.—*Id.*

COUNTIES.

1. COUNTIES—POWER TO TAKE REAL PROPERTY.—By general statute, "each county has power to purchase and hold for the use of the county lands lying within its own limits." Held, that under this statute the county of Umatilla had the capacity to take and acquire the legal title to the premises in controversy.—*Raley v. Umatilla Co.*, 172.
2. COUNTY'S CAPACITY TO TAKE CANNOT BE ATTACKED BY GRANTOR OR HIS HEIRS.—By the delivery of the deed to the county, the grantor divested himself of title. Whether by taking such title the county violated or abused its powers does not concern the grantor or his heirs. If raised at all, that question must be made by the State, and not by a private party.—*Id.*
3. COUNTY—ACTION AGAINST.—An instruction that before a recovery could be had against a county for an accident occasioned by the falling of an unsound bridge the jury must find that the bridge was a county structure, or knowingly recognized as such by the proper officials of the county, and that before a recovery could be had, that the proper authorities had been notified for a reasonable time before the accident of the defective condition of the bridge, or that the bridge had been so openly and notoriously unsafe as to convey notice of its defective condition for a reasonable time, by reasonable time being meant such time as by the exercise of proper diligence would have allowed its repair, and that if "the accident was the result of internal decay not perceptible, the defendant is not liable unless actual notice had been given to the proper officials; held, to be as favorable to defendant as it could claim.—*Ford v. Umatilla Co.*,

See ROADS.

CRIMINAL LAW.

1. CRIMINAL LAW—INDICTMENT, FORM OF.—In an indictment for taking money by force from the person of another, it is not necessary under our statute to allege that the money taken was the property of another than the defendant.—*State v. Dilley*, 70.
2. INDICTMENT—FORM OF.—Upon a motion in arrest of judgment, an indictment charging the defendant, "that . . . and being a room in which personal property of said county and State was kept, did then and there the room aforesaid unlawfully break and enter with the intent the goods, etc., there situate, to steal," etc., sufficiently avers that there was property of the county kept in the room at the time of entry. The sentence is ill-arranged, but objection should have been made before trial.—*State v. Johns*, 27.

CRIMINAL LAW (Continued).

3. **CRIMINAL LAW — INDICTMENT.** — A party indicted for the crime of burglary cannot be convicted of the crime of an assault with the intent to commit rape. — *State v. Ryan*, 572.
4. **INDICTMENT — ASSAULT WITH THE INTENT TO COMMIT RAPE.** — An indictment for the crime of burglary which charges that the defendant broke and entered the house with the intent to commit rape, and having so entered said house did then and there commit an assault upon one E. M. M., then lawfully in said house, did not charge an assault on E. M. M. with the intent to commit rape. — *Id.*
5. **BURGLARY — NOT A CRIME CONSISTING OF DIFFERENT DEGREES.** — Burglary is not a crime consisting of different degrees, like the various degrees of criminal homicide and the like; nor is an assault with intent to commit rape one of the "degrees" of such crime. — *Id.*
6. **INDICTMENT — EFFECT OF ALLEGATIONS THEREIN.** — The allegations in said indictment, after the charge of breaking and entering, were inserted to show the unlawful intent with which such breaking and entering was done, and can perform no other office therein than to characterize the intent. — *Id.*
7. **ACCOMPLICE — WHO IS NOT.** — A person who did not counsel, aid, or abet, or in any manner participate in the commission of a crime, and whose only knowledge of the facts was derived from what she saw and heard at her husband's house, who was one of the parties implicated, is not an accomplice. — *State v. Roberts*, 187.
8. **CONSPIRACY — ACTS AND DECLARATIONS OF CONSPIRATORS.** — After proof of a conspiracy, or agreement to commit a crime, all that was said or done by any of the conspirators in furtherance of the unlawful purpose may be introduced in evidence upon the trial of all or either of them. — *Id.*
9. **INSTRUCTIONS BY THE COURT — PROVINCE OF THE JURY.** — The court did not err in refusing to tell the jury that proof by the defendant of one single fact by a preponderance of the evidence, inconsistent with the defendant's guilt, is sufficient to raise a reasonable doubt, and the jury should acquit the defendant. In such case, it is the province of the jury to determine the effect of the evidence, and this right cannot be influenced or controlled by the court. — *Id.*
10. **REASONABLE DOUBT — DEFINITION OF.** — The court defined a reasonable doubt as follows: "A reasonable doubt is not every doubt; it is not a captious doubt. It is such a condition of mind resulting from the consideration of the evidence before you as makes it impossible for you, as reasonable men, to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory." *Held*, not error. — *Id.*
11. **REFUSAL TO CHARGE — WHEN NOT ERROR.** — The instruction asked by the defendant on the subject of reasonable doubt contained a correct statement of the law, and ought to have been given; but inasmuch as the ground was fully covered by the instruction given by the court on its own motion, on the same subject, *held*, that the error did not prejudice the defendant. — *Id.*
12. **EVIDENCE — ADMISSIBILITY OF — WHEN FACTS CONSTITUTED PART OF THE CRIMINAL ACT, THOUGH THEY MAY EVEN TEND TO PROVE ANOTHER CRIME.** — The evidence offered tended to prove that the powder and fuse used to burn the barn were obtained from the powder-house of a third person. *Held*, that it was competent to prove all the facts, though in doing so the evidence offered tended to prove another crime; but that in this particular case the evidence offered did not necessarily tend to prove another crime. — *Id.*
13. **DEFENDANT'S INTENT — INSTRUCTION.** — The indictment charged the defendant with having wilfully, maliciously, and unlawfully set fire to and burned W. S. L.'s barn. The defendant asked the court to tell the jury that if defendant set fire to a hay-stack near the barn with a malicious, wilful, and unlawful intent, and by

CRIMINAL LAW (Continued).

- that means the barn was burned, that he must be acquitted. This the court refused; *held*, not error. It was the province of the jury to say with what intent the hay-stack was fired, and if it was fired as a means or with the intent to burn the barn, the defendant's guilt would be the same as if he had actually applied the torch to the barn. — *Id.*
14. **EVIDENCE—DEFENDANT'S ADMISSION.**—An admission made by the defendant that a short time after the administration of the poison—morphine—which destroyed the life of deceased, he took money from the pocket of said deceased to keep for him, was properly received, on the ground that the entire statement is to be taken together, and it is not objectionable even if it tended to prove another offense.—*State v. Moran*, 262.
 15. **EVIDENCE—PRACTICE.**—Where on a trial the State proved that the tracks of a horse ridden by the defendant were similar to those of another horse owned by the defendant, upon the direct testimony, and the defendant introduced testimony showing that the horse was shod, and the State in rebuttal introduced witnesses to show that the horse was not shod; *held*, that it was error to exclude evidence offered by the defendant after the rebuttal by the State, that the horse was shod the day after the commission of the crime.—*State v. Dilley*, 70.
 16. **PRACTICE—CRIMINAL LAW—PREJUDICIAL REMARKS OF JUDGE AT THE TRIAL.**—On the trial of a physician for manslaughter caused by producing an abortion, which resulted in the death of the mother, the State offered to prove by a witness who was a cook by occupation that the deceased was pregnant. It was objected that the witness was incompetent. The court in overruling the objection said: "Anybody can tell whether a woman is pregnant or not at times by her looks, from common observation. There is a great deal of humbug about medical science . . . and medical testimony. . . . There is many a man practicing medicine who ought to be second-class cook in a third-class hotel." *Held*, prejudicial to defendant, and ground for new trial.—*State v. Clements*, 237.
 17. **MANSLAUGHTER BY ABORTION—BURDEN OF PROOF.**—The burden of proof is on the State in such cases to prove that the abortion was not necessary to preserve the life of the mother. *Semble*, that this is especially the case where the accused is a practicing physician.—*Id.*
 18. **EVIDENCE.**—Proof that the deceased said to witness the day before she died that "the doctor had used instruments upon her" is only hearsay evidence, and inadmissible.—*Id.*
 19. **EVIDENCE—CRIMINAL LAW—MOTION TO STRIKE OUT EVIDENCE.**—The physician who made the *post mortem* examination and testified at the inquest, as well as the coroner, were called as witnesses, for the purpose of proving the death of deceased, and in their evidence they each called the deceased by his true name, though they had no knowledge of his true name other than having heard him referred to by that name. *Held*, the court did not err in refusing to strike out such evidence.—*State v. Moran*, 262.
 20. **SECTION 169 OF THE CRIMINAL CODE—STATE v. WINTZINGERBODE, 9 OR. 153, APPROVED.**—Section 169 of the Criminal Code is only declaratory of the rule of the common law.—*Id.*
 21. **CONFESSION AS EVIDENCE—DUTY OF THE COURT WHEN OFFERED.**—Whenever a confession is offered in evidence against the accused, the court must ascertain and determine, as a question of fact, whether or not it was obtained by the influence of hope or fear applied by a third person to the prisoner's mind. This inquiry is preliminary and is addressed entirely to the judge.—*Id.*
 22. **EVIDENCE—CONFESSIONS OF PRISONER MADE UNDER AGREEMENT WITH THE DISTRICT ATTORNEY.**—The appellant agreed with the district attorney that he would testify fully and freely in the case then pending against one Kelley on a charge for the same killing, and did so testify before the coroner's jury and the grand

CRIMINAL LAW (Continued).

- jury, but during Kelley's trial, the appellant escaped and Kelley was acquitted. *Held*, that when the defendant was put on his trial for the same killing, his confessions and former testimony might be given in evidence against him. (*Commonw. v. Knapp*, 10 Pick. 477, approved and followed.)—*Id.*
23. EVIDENCE GIVEN BEFORE THE GRAND JURY.—If in the opinion of the trial court the ends of public justice require it, such court may allow a member of the grand jury to testify as to what any witness testified to before that body, if such evidence is otherwise competent.—*Id.*
24. CRIMINAL LAW.—INDICTMENT.—EVIDENCE.—Under section 748, Code of Criminal Procedure, where it is charged that the prisoner killed deceased by administering poison, *held*, that it is competent to prove that the poison was in fact administered by the hand of another, provided it be shown that the defendant procured the act to be done, or aided, abetted, or in any manner assisted in the commission of the crime.—*Id.*
25. LARCENY.—A person committing larceny in a foreign country, and converting the stolen property to his own use in this State, either personally or by innocent agents, is guilty of larceny in this State.—*State v. Barnett*, 77.
26. JUDGMENT IN CRIMINAL ACTION.—Where a judgment dated April 9, 1887, provides that the defendant be hanged on the twenty-ninth day of June, 1887, and a warrant of execution is issued reciting the judgment of conviction, and appointing the second day of June, 1887; *held*, that this was an irregularity under section 1421 of Hill's Code, providing that the warrant of death must be executed "not less than thirty nor more than sixty days from the time of judgment," but not such as would warrant granting a new trial, and that the judgment should be modified so as to adjudge in effect that defendant be detained until such day as shall be named in the warrant of execution to be thereafter designated by the court from which the appeal was taken; that the first warrant be set aside, and the case remanded, with directions to carry out the judgment of death in accordance with the verdict of the jury.—*State v. Marple*, 205.

See CONTRACTS, 5; COSTS, 6; JURY AND JURORS, 5.

CROSS-BILLS.

- COMPLAINT IN THE NATURE OF A CROSS-BILL.—EFFECT OF FILING.—PRACTICE.—When a defendant in an action at law files a complaint in the nature of a cross-bill, asking equitable relief, he institutes a suit which must be determined before any further proceedings in the law action can be had. The practice in such cases should be liberal. If it is necessary to a proper adjudication that a third person be made a party, the court should require this to be done, not dismiss the complaint.—*Oatman v. Epps*, 437.

See APPEAL, 6.

DAMAGES.

1. MEASURE OF DAMAGES.—COMPENSATION.—As a general rule, the plaintiff ought to recover such sum as will compensate him for the injury he has suffered by the wrong of the defendant.—*Budd v. Mulnomah St. Ry. Co.*, 413.
2. PROFITS.—SPECULATIVE DAMAGES.—Generally too remote to furnish a basis for recovery.—*Wilder v. Oregon R. & N. Co.*, 153.
3. TORT.—MALICE.—MEASURE OF DAMAGES.—The usual and ordinary measure of damages in an action for a tort is that sum which will fully compensate the plaintiff for the actual injury he has sustained; but when the wrong is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, or that the act was done wantonly, maliciously, or wickedly, the jury may, in their discretion, give exemplary damages.—*Day v. Holland*, 464.

DAMAGES (Continued).

4. **EVIDENCE TO REBUT MALICE.**—Where the injury complained of is alleged to have been done maliciously, or under circumstances which would authorize the jury to give more than the actual damages, it is competent for the defendant to prove any facts which tend to show he did not act maliciously or with a bad motive. — *Id.*
5. **DAMAGES, MEASURE OF—WHAT IS.**—An instruction in an action against a county for injuries caused by a defective bridge "that the measure of damages in this case, if you find for the plaintiff, is the value of the horses killed, and a sum equal to the amount of damage which the evidence shows to have immediately resulted to plaintiff's other property from the accident, and any expenses necessarily incurred by him, as the natural and immediate result of the accident," held, to be substantially correct.—*Ford v. Umatilla County*, 813.
6. **CONVERSION OF STOCK—MEASURE OF DAMAGES.**—In case of the conversion of stock, the ordinary rule as to the measure of damages is the value of the stock at the time of the conversion, or a reasonable time thereafter; but an exception is, when a party has suffered only a technical conversion without any pecuniary loss, he can recover only nominal damages.—*Budd v. Multnomah St. Ry. Co.*, 413.

See MARRIAGE AND DIVORCE, 4, 5; ROADS.

DECREES. See JUDGMENTS AND DECREES.

DEEDS.

1. **DEED—GRANTEE.**—In every deed or grant there must be a grantee named, or be ascertained by description, so as to distinguish him from all others. — *Kelly v. Bourne*, 476.
2. **CONDITION SUBSEQUENT—DEFINED.**—To create a condition subsequent in a deed, apt words are necessary, such as "on condition," "provided always," "if it shall so happen," and the like. — *Raley v. Umatilla County*, 172.
3. **CASE IN JUDGMENT.**—A deed to the defendant made by Aura M. and her former husband, which contained the following clause: "The parties of the first part covenant to and with the party of the second part, that they will warrant and defend the same against all claims whatsoever to the use and benefit of the parties of the second part, for the special use and none other of educational purposes, and upon which block shall be erected a college or institution of learning free from all sectional or political influences;" held, not to create an estate upon condition subsequent. — *Id.*
4. **REMEDY IN CASE OF CONDITION BROKEN.**—If a condition subsequent be broken, the party entitled may re-enter, and if necessary, regain his estate by action, but equity will not aid him. — *Id.*

See EVIDENCE, 2-4; FRAUDULENT CONVEYANCES; PARTNERSHIP, 4.

DISTRICT ATTORNEY. See MARRIAGE AND DIVORCE; OFFICE AND OFFICERS, 6, 7.

EASEMENTS. See LICENSE.

EQUITY.

1. **CONTRACT—PLEADING TO REFORM.**—In order to have a contract reformed, the pleading should set out what the contract was as the parties made it, and why its terms happened to be left out, or how terms not agreed upon came to be inserted. — *Foster v. Schmeer*, 363.
2. **SAME—PROOF REQUIRED TO REFORM.**—In all cases to reform a contract, the court will require strong and convincing proof of the mistake; but where mis-

EQUITY (Continued).

take is shown, that, if not corrected, would operate to the prejudice of a party, and which did not occur through the party's carelessness or negligence, the court will correct it. — *Id.*

See **APPEAL, 6; JUDGMENTS AND DECREES, 4, 5; PLEADING AND PRACTICE.**

ESTATES OF DECEDENTS.

1. **ESTATE OF DECEDENTS.** — An action may be maintained against the estate of a deceased person, without presentation to the County Court, for allowance under the Act of 1885, section 1134, Hill's Code. — *Ray v. Hodge, 20.*
2. **NONSUIT — WHEN IMPROPERLY GRANTED.** — In an action by an administrator for money discovered by the respondent concealed under an old barn, which money had been by the respondent treated as *lost property*, and it was proven on the trial that appellant's intestate was possessed of money shortly before her death, corresponding in amount to that found; that she was in the habit of concealing her money; that no money was found about her premises; that she attempted to tell her daughter something about money, but was too far exhausted to make herself clearly understood; *held*, that sufficient proof was adduced to submit the question to the jury, whether the money was in fact the money of the appellant's intestate; and *held, further*, that a nonsuit on motion of the respondent was improperly granted. — *Sovern v. Yoran, 644.*

ESTOPPEL.

1. **EQUITABLE ESTOPPEL — LEGAL TITLE.** — In an action at law to recover possession of real property, an equitable estoppel cannot prevail against the legal title. The equity could only be brought before the court in such case by cross-bill, as provided in section 381 of Hill's Code. — *Moore v. Frazer, 635.*
2. **ESTOPPEL.** — When the plaintiff was the efficient cause of the defendant corporation making large expenditures of money, and he was one of its officers at the very time and superintendent of the work, he is estopped, and could not set up his own acts, as such superintendent, as the identical wrong committed by defendant, of which he now complains. — *Budd v. Mullinmah St. Ry. Co., 404.*

EVIDENCE.

1. **WRITING — CONTENTS OF — WHEN PROVEN BY PAROL.** — Before oral evidence can be received of the contents of a written instrument, it must be shown to the satisfaction of the trial court that an honest and diligent attempt had been made to obtain the writing itself, and that such attempt was unsuccessful, or proof be made that it had been destroyed. The effect of such evidence, improperly admitted, is not cured by an instruction, "that if the contract was in writing, the jury was not at liberty to consider such oral evidence," there being no contention as to the fact of the contract being in writing. — *Krewson v. Purdom, 589.*
2. **EVIDENCE — RECORDED DEED COMPETENT.** — The record of a conveyance duly recorded, or a transcript thereof duly certified by the county clerk in whose office the same may have been recorded, may be read in evidence in any court in this State with like force and effect as the original conveyance. — *Stanley v. Smith, 505.*
3. **EVIDENCE — OBJECTIONS THERETO.** — When evidence is offered, the better practice is for counsel to submit the objections thereto which are relied upon, so that one ruling may dispose of them. — *Id.*
4. **SECTION 8043 OF HILL'S CODE CONSTRUED.** — This is a remedial statute, and its provisions must be liberally construed in furtherance of the legislative intent, and its effect was to make unsealed deeds which had been recorded of the same effect and validity as if they had been sealed. — *Id.*

EVIDENCE (Continued).

5. **GENERAL REPUTATION—HOW PROVEN.**—Witness must first be asked touching his knowledge of the party's *general* reputation, and he may be then asked whether it is good or bad, if found to possess sufficient knowledge on that subject. — *Kelley v. Highfield*, 277.
6. **JUDICIAL NOTICE.**—The court may take judicial notice that merchantable products, such as hay and potatoes, in Oregon have a value. — *McKay v. Musgrove*, 162.
7. **BURDEN OF PROOF.**—When a fact is more particularly within the knowledge of one party than the other, the burden of proving such fact is on such party. — *Weber v. Rothchild*, 385.
8. **EVIDENCE, BEST—WHEN PRODUCED.**—Where the evidence offered clearly established the mistake alleged, and was uncontradicted, and the record disclosed this to have been admitted by the original parties to the transaction, *held*, that the failure to call such parties as witnesses did not infringe the rule that the best evidence must be produced. — *Mooney v. Holcomb*, 639.

See **APPEAL**, 5; **ASSUMPSIT**, 2; **BILL OF EXCEPTIONS**; **CONTRACTS**; **COUNTERCLAIM**; **CRIMINAL LAW**; **DAMAGES**; **FRAUDULENT CONVEYANCES**; **INSTRUCTIONS**; **MORTGAGES**; **NEGLIGENCE**; **TRESPASS**; **TRUSTS**; **WATERS**; **WITNESSES**.

EXCEPTIONS. See **BILL OF EXCEPTIONS**.

EXECUTORS AND ADMINISTRATORS.

EXECUTOR OF PARTNERSHIP ESTATE.—Where it was provided by a will that the executor therein named should not be required to give bonds, and the executor, who was a partner of the deceased, administered upon the *general* estate of deceased, and also caused himself to be appointed administrator of the *partnership* estate, and retained the administration thereof after he had closed up the general executorialship; *held*, (1) That he should have closed up the partnership estate first. (2) That he should be required to give bonds as executor of the partnership estate, notwithstanding the provision of the will. — *Palicio v. Blyne*, 142.

FIXTURES.

1. **REAL PROPERTY—FIXTURES—RELAXATION OF COMMON LAW.**—When and under what circumstances and conditions a chattel becomes annexed to land, so as to subject it to the same conditions in every respect, is frequently difficult to determine; but with the growth and development of trade and manufactures, much of the strictness of the common law on this subject has been relaxed. — *Henkle v. Dillon*, 610.
2. **FIXTURE—WHAT IS.**—To give a chattel the character of a fixture, and render it immovable, three things are necessary: (1) Actual annexation to the realty, or some appurtenant thereto; (2) application to the purposes or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties making the annexation to make a permanent accession to the freehold. — *Id.*
3. **AGREEMENT THAT CHARACTER OF CHATTELS SHALL BE UNCHANGED BY ANNEXATION—EFFECT OF.**—When before annexation parties agree that things personal in their character shall continue to be personal, or retain their character as chattels though annexed to the realty so as to become a part of it without such agreement, they will continue to be chattels if they can be removed without material injury to the articles themselves, or to the freehold. — *Id.*
4. **FACTS OF PARTICULAR CASE.**—Considered and held that the machinery in question was not so annexed to the freehold as to become a part of it. — *Id.*

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY, SERVICE OF SUMMONS IN.**—Section 8 of the Justice's Act, providing that the defendant shall be required to appear not less than six nor more than twenty days from the date thereof, does not apply to actions of forcible entry and detainer.—*Beffels v. Flint*, 158.
2. **SAME.**—Section 4 of the Forcible Entry and Detainer Act only prescribes that the service is to be made in the same manner, and a return be made as in other cases, and defendant in such case may be required to answer not less than two nor more than four days after service.—*Id.*

FRANCHISES.

1. **REMEDY—ACTION AT LAW WILL NOT LIE, WHEN.**—An action at law will not lie to recover the possession of a franchise. It is not tangible or capable of any kind of physical identification or delivery.—*Budd v. Multnomah St. Ry. Co.*, 404.
2. **REMEDY—ACTION TO RECOVER DAMAGES.**—At common law, an action on the case would lie to recover damages for the disturbance of the plaintiff in the enjoyment of a franchise; but in such case the party recovers damages, and not the possession of the particular franchise.—*Id.*

FRAUD. See ATTORNEY AND CLIENT.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE—INADEQUACY OF CONSIDERATION.**—When land of the value of two thousand dollars was conveyed for the consideration of one hundred dollars, held, that as against existing creditors, such deed was constructively fraudulent.—*Scoggin v. Schloath*, 380.
2. **CONSIDERATION IN DEED—WHEN MONEYPED CONSIDERATION CANNOT BE SHOWN.**—When the consideration in a deed is expressed to be natural love and affection, or marriage, or the like, it is not competent for the purpose of supporting the deed to prove that the consideration was a moneyed one.—*Id.*
3. **SAME—DIFFERENT IN KIND.**—A consideration different in kind from that expressed in a deed cannot be proven; but when the consideration expressed is a moneyed one, for the purpose of rebutting the presumption of fraud, a larger or different moneyed consideration may be proven.—*Id.*
4. **FRAUD—PROOF OF.**—Circumstances considered which tend to prove the deed was fraudulent.—*Id.*
5. **FRAUDULENT TRANSFER.**—A conveyance made without any consideration, or upon some reservation for the benefit of the grantor, or to some person who has no interest in the conveyance, or upon a secret trust, may be set aside without reference to the knowledge or intent of the grantee.—*Chamberlain v. Leahy*, 8.
6. **SAME.**—The equity of a purchaser for a valuable consideration is greater than that of a creditor.—*Id.*
7. **SAME.**—Notice of the fraudulent intent of the grantor must be actual; but it is a question of fact, and may be established by direct evidence, or it may be inferred from circumstances, and from proof of the vendee's knowledge of facts calculated to awaken suspicion.—*Id.*
8. **SAME.**—Knowledge of facts which should put a prudent man upon inquiry are sufficient to warrant an inference of actual notice.—*Id.*
9. **SAME.**—Where the grantor being insolvent transferred property to his business partner, by whom it was transferred to grantor's brother, defendant, without consideration in either case, and defendant negotiated a loan of six hundred dollars upon the property, which was worth two thousand five hundred dollars, and gave the six hundred dollars to the insolvent, and it was claimed it was used by him to pay some of his debts, the transfer was set aside as crediting a secret trust, and because it was fraudulent.—*Id.*

FRAUDULENT CONVEYANCES (Continued).

10. **SAME.** — The deed being fraudulent was not allowed to stand as a security for money advanced. — *Id.*
11. **FRAUDULENT TRANSFER — LIS PENDENS — KNOWLEDGE OF GRANTEE — NOTICE.** — Notice of the fraudulent intent of the grantor may be fixed on the grantee by the circumstances of the transaction, questioning *Coolidge v. Henckey*, 11 Or. 327. *Philbrick v. O'Conner*, 15.
12. **FACTS IMPUTING FRAUD.** — The grantor shot a man, and action was commenced against him for damages. Pending the action, he transferred the property to T. J. O'Conner for a consideration of one third of its actual value. The grantor boarded in the family of grantee; the shooting by grantor and the pendency of the action were widely known, and were talked of in the family of grantee, and grantee was without any means or regular employment. *Held*, that these circumstances were badges of fraud, and the deed fraudulent under sections 3059, 3060, 3061, 3062, of Hill's Code. A deed only constructively fraudulent may be allowed to stand as security for money advanced. — *Id.*
13. **FRAUDULENT CONVEYANCE — AGREEMENT TO RECONVEY.** — Where at the time of the execution of a deed, for the expressed consideration of two thousand five hundred dollars, an agreement is made to reconvey in a year for the same amount, and the property was of the value of six thousand dollars, such deed and agreement create a trust in favor of the grantor, and is as against the grantor's wife, who is about to prosecute a suit for a divorce and alimony, fraudulent. — *Weber v. Rothchild*, 385.
14. **PURCHASER FROM FRAUDULENT GRANTOR — HOW PROTECTED.** — A purchaser from a fraudulent grantor can only protect himself when the transaction is assailed for fraud, by alleging and proving that he paid a valuable consideration for the property, giving the facts; that at the time of such payment he had no notice of the outstanding equity or fraudulent intent, as the case may be, and that he acted in good faith. — *Id.*
15. **ONUS PROBANDI — WHEN UPON THE DEFENDANT.** — When it appears that the grantor in a deed intended to defraud his wife out of alimony in a suit for a divorce which she was about to commence, and that he made the deed for that purpose to E. S. R., *held*, that E. S. R. can only protect his title by alleging and proving that he is a *bona fide* purchaser for value and without notice; *held*, also, that the facts of the payment of value, and when paid, as well as the want of notice, are facts lying peculiarly within the knowledge of the defendant E. S. R., and that for that reason the obligation of proof lies with him. — *Id.*
16. **FRAUDULENT CONVEYANCE.** — *Held*, under the particular facts disclosed by the evidence in this case, that the defendant W., at the time he conveyed the property in controversy, intended to hinder, delay, and defraud the plaintiff in the prosecution of her contemplated suit for a divorce, and for a recovery of alimony and one third of Weber's land. — *Id.*
17. **FRAUDULENT CONVEYANCE — ANSWER — BONA FIDE PURCHASER.** — To constitute a good answer that defendant is a *bona fide* purchaser for value and without notice, it must be alleged: (1) Seisin of the grantor in fee, or a pretended seisin and possession at the time of the conveyance, if it pretended to confer immediate possession. (2) A conveyance and not articles merely. (3) The consideration and actual payment of the same. — *Id.*
18. **PRESUMPTION OF FRAUD — WHEN DOES NOT ARISE.** — If a deed were intended as a deed of trust, and was taken by the plaintiff for that purpose, and was such as would necessarily delay M. S. & Co. in the collection of their claim, the law will not, from these facts alone, presume that such deed was executed with a fraudulent intent. These facts might be weighed with the other facts in the case, but standing alone, they raise no presumption of fraud. — *Stanley v. Smith*, 505.

See JUDGMENTS AND DECREES, 6, 7; JURISDICTION, 3.

GARNISHMENT.

1. **GARNISHEE—DUTY OF, IN ANSWERING.**—If a garnishee knew that the debt sought to be garnished had been assigned to another, and neglected to plead such assignment in his answer, or to defend himself against the claim set up against him in the garnishment proceedings, neither the fact of such garnishment nor the judgment rendered against him under the proceeding will constitute a defense to a suit brought against him by the assignee, to whom the debt had been assigned prior to said attempted garnishment. — *Phipps v. Rieley*, 494.
2. **NOTICE OF ASSIGNMENT—WHEN EFFECTUAL.**—Notice of assignment at any time before the filing of his answer, or even before judgment, will impose the duty on the garnishee of setting up such assignment. — *Id.*
3. **GARNISHEE—HIS DUTIES.**—The garnishee is entirely indifferent between the parties, and he can properly do nothing to aid either party to the litigation; but he must act for his own protection, and plead that the debt attempted to be garnished has been assigned whenever he has notice of it. — *Id.*
4. **GARNISHEE—ANSWER OF.**—The answer of a garnishee which simply denies in *hæc verba* the allegations of the complaint does not raise an issue, and the complaint will be taken as confessed, and judgment rendered against the garnishee, where it appears that such denials were deliberately made. — *Dawson v. Maria*, 556.
5. **SAME.**—Doubtful and evasive answers should be taken against the garnishee. (Drake on Attachment, § 377; Wade on Attachment, § 633.) — *Id.*

GRANT.

GRANT TO D. E. BUDD AND SUCH PERSON AS HE MAY ASSOCIATE WITH HIMSELF THEREIN.—Effect of such grant considered, but not expressly decided. — *Budd v. Multnomah St. Ry. Co.*, 404.

See **LICENSE**.

GUARANTY.

CONTRACT—GUARANTEE, CONSTRUCTION OF.—A contract reading, "I hereby guarantee the sum of \$200 per month, payable in advance, for a period of twenty-five and two third months, aggregating \$5,138, for rent, etc., *held*, (1) To be a guaranty on the part of the signer that the lessee of the premises should pay the sum of \$200 monthly in advance. (2) The liability accrued upon the first of any month that the rent was not so paid in advance, and action could be maintained thereon. (3) That no demand of payment or notice to the principal is necessary. (4) The court will look at surrounding circumstances to ascertain the intention of the parties, and will not be controlled by the technical meaning of the word "guarantee." (5) That the contract was severable. — *Weiler v. Henarie*, 28.

INDICTMENT. See **CRIMINAL LAW**.

INJUNCTIONS.

INJUNCTION, GROUNDS FOR REFUSING.—Where it appears that S. has granted to B. the *sole and exclusive* right to hunt upon the waters of S.'s land, and that B. has issued permits to numerous persons who have hunted not only on the waters, but also on the lands of S., have conducted themselves in an insolent manner, and have wounded the domestic animals of S., the court will not grant an injunction restraining S. from acts inconsistent with the nature of the contract on his part. — *Bingham v. Salene*, 206.

INSOLVENCY. See **ATTORNEY AND CLIENT**, 2.

INSTRUCTIONS.

1. **INSTRUCTION MUST NOT WITHDRAW FACTS IN EVIDENCE FROM THE JURY.**—A hypothetical instruction which fails to notice material facts in evidence, and which attempts to submit the case to the jury on the assumption that such facts were not in evidence, is erroneous, and the court did not err in refusing it. The effect of such an instruction is to withdraw material facts from the consideration of the jury.—*Kelley v. Highfield*, 277.
2. **INSTRUCTION—WHEN NEED NOT BE GIVEN.**—An instruction which in effect withdraws from the consideration of the jury material facts, and which directs them to base their verdict on certain specified facts, and which instruction ignores other material facts in evidence, ought not to be given.—*Stanley v. Smith*, 506.

See ATTACHMENT, 2; BILL OF EXCEPTIONS; CRIMINAL LAW; LANDLORD AND TENANT.

JOINT TENANT. See ACCOUNT, 1.

JUDGMENTS AND DECREES.

1. **DECREE CANNOT BE COLLATERALLY ATTACKED.**—In a suit to enjoin the enforcement of a decree creating a lien on certain land, which had been purchased by the plaintiff subsequent to the rendition of the decree from the judgment debtor; *held*, (1) That the decree could not be collaterally attacked unless it was absolutely void. (2) That the fact that the complaint upon which the decree was obtained, being for the foreclosure of a mortgage, did not set forth the consideration of the mortgage, was an irregularity which could have been objected to in the trial by the defendant, but did not invalidate the decree finally obtained.—*Berry v. King*, 165.
2. **DECREE OF COLLATERAL ATTACK UPON.**—The courts of the United States being courts of superior jurisdiction, their decrees are not open to collateral attack, unless it is affirmatively shown by the record that they had no jurisdiction.—*Applegate v. Dowell*, 513.
3. **JUDGMENT OF DE FACTO JUDICIAL OFFICER—COLLATERAL ATTACK UPON.**—When F. was holding the office of justice of the peace, and in a subsequent election was defeated by H., who received the certificate of election, duly qualified, and demanded possession of the office, which F. refused to surrender, *held*, that F. was a *de facto* officer, and that a judgment obtained before him could not be collaterally assailed.—*Hamlin v. Kassafer*, 456.
4. **EQUITY—WHEN RELIEF AGAINST JUDGMENT GRANTED IN.**—A judgment was obtained before a justice of the peace in an action for the recovery of personal property. Judgment was entered for the return of the property, but the justice omitted the alternative part of the judgment as to value, in case a delivery could not be had. The defendant in that action appealed, and then dismissed his appeal. The appellate court failed to enter judgment at the time of the dismissal. Subsequently the justice of the peace corrected his docket, and entered judgment for the value of the property. The appellate court also entered a final judgment in the case for the property, or its value. The defendant now seeks to enjoin the enforcement of the judgment. *Held*, he has no standing in a court of equity until he has complied with that portion of the judgment against which no complaint is offered.—*Putnam v. Webb*, 440.
5. **JUDGMENT, ERRONEOUS—MUST BE CORRECTED BY APPEAL.**—If a judgment of the Circuit Court is erroneous, the proper remedy is not through a court of equity, but by appeal from the judgment. (Hill's Code, § 535.)—*Id.*
6. **JUDGMENT—CREDITORS' RIGHTS OF.**—Respondents and appellants having obtained separate judgments against one V. C., the appellants applied to the respondents, whose judgments were prior to that of appellants, to unite with them in a suit

JUDGMENTS AND DECREES (Continued).

to set aside a prior judgment of one H., against said V. C., which the respondents refused to do; but entered into an agreement with H., whereby they received a note from him and gave him a receipt for the same, specifying that it was given to pay their judgments, and that if the property was sold under execution for cash, they should receive the same and surrender up the note; but if H. bid in the property they were to hold the note in lieu of their judgments. The appellants then began suits against H. and the respondents to have his judgment declared fraudulent, and to obtain priority over the judgments of respondents. The property of V. C. was sufficient to satisfy the judgment of H. and the respondents. Upon trial the judgment of H. was found to be fraudulent. *Held*, (1) That if the H. judgment was fraudulent, the other respondents, having a subsequent lien, did not lose their priority of lien in consequence of their refusal to unite with the appellants in such suit, nor by endeavoring to obtain payment thereof through the agreement with H. (2) That the note given them could not be considered as having paid their judgments. (3) That the fact that they refused to join with the appellant in a suit to set aside the H. judgment, and entered into the arrangement with H., did not taint their judgments with fraud. (4) That this was not a case where the appellants would be entitled to a priority of lien over the respondents, as in a case of discovery of equitable assets. — *Lilienthal v. Hotelling Co.*, 371.

7. **DECREE—OWNER OF LAND, WHEN NOT AFFECTED BY.**—In a suit to quiet title, the plaintiff showed possession for the time limited by law for the commencement of actions to recover real estate, and also a regular deed thereto. *Held*, that a decree rendered against his grantor, subsequent to his purchase of the land, declaring the said grantor's deed fraudulent, where there was no issue upon the point in the suit in which the decree was rendered, did not estop the plaintiff from claiming title to the land. — *Applegate v. Dowell*, 513.

See APPEAL, 9; COSTS; CRIMINAL LAW, 26; NEW TRIAL; NONSUIT; REPLEVIN; RES ADJUDICATA; VERDICT.

JUDICIAL NOTICE. See EVIDENCE, 6.

JURISDICTION.

1. **UNITED STATES COURT—JURISDICTION OF.**—United States courts in equity and common-law cases are courts of *limited* although *not inferior* jurisdiction, and some especial grounds of jurisdiction must be shown to enable them to take cognizance of causes, and the facts set out as the ground of jurisdiction will be presumed to be the only source from which such jurisdiction is derived. — *Applegate v. Dowell*, 513.
2. **SAME.**—Consent of parties does not invest the court with jurisdiction. The law must confer it, or it does not exist in the court. — *Id.*
3. **SAME.**—In a suit between citizens of the same State to set aside a deed as fraudulent, and subject land in the State to a judgment of the State courts, an allegation of fraud upon the revenue laws of the United States does not show a cause cognizable in the federal courts under the laws of the United States. — *Id.*

See JUDGMENTS AND DECREES.

JURY AND JURORS.

1. **JUROR'S CHALLENGE.**—In an action against a county to recover damages, it is sufficient ground of challenge for implied bias that the juror called is a taxpayer. — *Ford v. Umatilla County*, 313.
2. **SAME.**—Where a party challenges a juror for implied bias, and his challenge is wrongfully overruled, the error so far as the particular juror is concerned is waived by a subsequent peremptory challenge to him. — *Id.*

JURY AND JURORS (Continued).

3. **SAME.** — There is no statute allowing questions to be asked of a juror as to prejudice existing in his mind, for or against either party to the action. — *Id.*
4. **SAME.** — It is proper in such case to submit a challenge for actual bias, and if excepted to by the opposing party and overruled by the court, the decision could be reviewed on appeal. — *Id.*
5. **CRIMINAL LAW — PRACTICE — VIEW BY THE JURY.** — Where the jury by agreement of counsel and the direction of the court visited the scene of the murder, and also the county jail, without the presence of the prisoner, *held*, that these facts furnished no sufficient reason why sentence should not be pronounced on the verdict. (*State v. Ah Lee*, 8 Or. 214, approved and followed.) — *State v. Moran*, 262.
6. **JURY — VERDICT OF — VIEW OF PREMISES BY — MISCONDUCT OF ATTORNEY.** — The jury with the consent of the parties went to view the premises where the work sued for was done. The attorneys stipulated that one attorney on each side should accompany the jury. Two of the plaintiff's attorneys went in the company of the jury, but had no communication with any of them. Besides these two, one other of the plaintiff's attorneys, with an attorney of the defendant, went in sight of but were not in company with the jury. *Held*, on motion to discharge the jury, that as the court below had a better opportunity to judge of the motives of the attorneys in mingling with the jurors, the denial to discharge them should be sustained. — *Keller v. Bley*, 429.
7. **JUROR, MISCONDUCT OF.** — A juror who went with the others to view the premises, and did not go over the same on account of lameness, but was in sight thereof, was not guilty of misconduct. — *Id.*
8. **JUSTICE'S COURT — VERDICT OF A JURY IN.** — Where a jury returned in a Justice's Court a verdict in favor of defendant, and the same was received, and they thereupon informed the court that they intended by the verdict to find in favor of the plaintiff, and the justice then allowed them to separate to appear at another day, at which time they did appear and were allowed to render another verdict in favor of the plaintiff as originally intended, and were then discharged; *held*, (1) That the first paper filed was not their verdict, as the jury did not agree on the same as such. (2) That the second verdict was irregular, as the jury had been allowed to separate, and should be set aside and a new trial had. — *Nickelson v. Smith*, 200.

See INSTRUCTIONS; JUSTICES' COURTS.

JUSTICES' COURTS.

JUSTICE'S COURT — JURY TRIAL IN — PARTY CALLING FOR, CONCLUDED BY THE VERDICT OF, WHEN. — The party calling for a jury in a Justice's Court is concluded by the verdict thereof, unless the fine or judgment be for an amount of money not less than fifty dollars. (*Hill's Code*, § 2170.) — *State v. Sheppard*, 598.

See JURY AND JURORS, 8.

LANDLORD AND TENANT.

1. **LEASE — LANDLORD AND TENANT — WHAT IS NECESSARY TO CREATE.** — To create such relation, the defendant must have entered into possession in subordination to the owner's title, and with his consent, express or implied. — *Neppach v. Jordan*, 308.
2. **SAME.** — When the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the relation of landlord and tenant, exists and the possession is lawful until it is lawfully terminated. — *Id.*

LANDLORD AND TENANT (Continued).

3. SAME.—A person who enters without any lease or consent from the owner is only a trespasser, and is entitled to but ten days' notice, whether the occupation be for agriculture or not.—*Id.*
4. SAME.—An instruction to the jury that if they found that the defendant entered into possession of the premises without the consent of the owner, but by an arrangement with a former tenant, before such former tenant's term expired, the defendant would be holding over under the former tenant's lease, and be only entitled from that fact to ten days' notice to quit. *Held*, to be error as misleading, when it appeared that the defendant had no assignment from the former tenant, who was a lessee of the owner, but simply by consent of both the former tenant and the owner, entered upon the premises and occupied them jointly with the former tenant until the expiration of his lease, when he vacated the premises. The defendant's rights could not depend at all upon the terms of the former tenant's lease.—*Id.*
5. SAME.—It was not error to refuse to instruct the jury that if they found that the defendant occupied the premises in question for agricultural or farming purposes, he would be entitled to ninety days' notice to quit, as the instruction assumed that the occupation was with the consent of the owner, and that being in dispute, was a question of fact for the jury to determine.—*Id.*

See ATTACHMENT; COUNTER-CLAIM; MINES AND MINING.

LARCENY. See CRIMINAL LAW, 25.

LICENSE.

1. LICENSE TO HUNT—PROFIT A PRENDRE—GRANT OF.—A grant of "the sole and exclusive privilege and easement to shoot, take, and kill" wild fowl "on the lakes, sloughs, and waters" of the grantor, executed to the grantees, "their heirs and assigns forever," with a privilege of "ingress and egress to and from said lakes, waters, and sloughs for the purpose of shooting and taking wild fowl as aforesaid," is a grant of a *profit a prendre*, and not a mere license revocable at pleasure.—*Bingham v. Salene*, 208.
2. SAME—GRANT—CONSTRUCTION OF—PERMITS.—That in the exercise of this right the grantees are strictly confined to the places indicated in the grant, the lakes, sloughs, etc., and the grant does not authorize the indiscriminate granting of permits to others to exercise the same privilege.—*Id.*

See INJUNCTIONS.

LIENS. See MECHANICS' LIENS.

MANSLAUGHTER. See CRIMINAL LAW.

MARRIAGE AND DIVORCE.

1. BREACH OF PROMISE—EVIDENCE—RELATIONS OF PARTIES.—Upon the trial of an action for breach of promise, to enable the jury to understand the relations between the parties, their acts and feelings toward each other during the entire existence of the contract, as well as the causes and circumstances which attended the breaking of the engagement, evidence may be given of the declarations of the parties on those subjects.—*Kelley v. Highfield*, 277.
2. KNOWLEDGE OF LEWDNESS—ITS EFFECT UPON THE CONTRACT.—If a man knowingly enter into a contract of marriage with a lewd woman, he is bound to perform his contract or pay such damages as a jury may deem proper under all the circumstances.—*Id.*

MARRIAGE AND DIVORCE (Continued).

3. **GOOD FAITH OF THE DEFENDANT — EFFECT OF PLEADING WANT OF CHASTITY AS A DEFENSE.** — When the court in effect told the jury that if the defendant made the charges set up in his answer in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after the renewal of this contract with her, and he repudiated it by reason of this conduct of hers, of this belief that he had entertained, then you should not allow the circumstances to weigh as much in the assessment of damages as if he had made the charges recklessly, wantonly, and wilfully; but you will take the circumstances all into view, and inquire "How has he made the charge? Has it been a reckless, wanton, or malicious charge, or has it been done in good faith? You will determine the manner and *animus* of this defense, as well as the question of the amount of damages." *Held*, not error. — *Id.*
4. **MEASURE OF DAMAGES IN ACTIONS FOR BREACH OF PROMISE.** — In such case there is no fixed rule of damages, other than the sound discretion of the jury, under all the circumstances. They may allow punitive damages in their discretion. — *Id.*
5. **DAMAGES — EFFECT OF ANSWER SETTING UP WANT OF CHASTITY.** — The defendant by his answer alleged that the plaintiff was unchaste, but offered no evidence tending to prove such allegations, other than his own criminal conduct with the plaintiff. Under such circumstances, there is nothing upon which the claim of good faith can be predicated. — *Id.*
6. **DIVORCE — FALSE ACCUSATIONS OF ADULTERY.** — Such charges according to the settled law of this court entitles the injured party to a divorce. — *Eggerth v. Eggerth*, 626.
7. **CONDONATION — EFFECT OF.** — Cohabitation after knowledge of such injury is a condonation of the offense. — *Id.*
8. **CONDONATION — REPETITION OF THE OFFENSE.** — Condonation is a conditional forgiveness of the offense, the condition being that the offense shall not be repeated. If repeated, the condonation is to be deemed withdrawn or avoided, and the party may rely upon the facts alleged to have been condoned. — *Id.*
9. **DISTRICT ATTORNEY — PLEADING.** — In a suit for a divorce, when the district attorney intervenes in behalf of the State and files a pleading therein, such pleading is governed by the same rules, so far as applicable, by which the defendant's pleading is governed. — *Id.*
10. **ANSWER — BAR TO SUIT.** — To render any of the matters enumerated in subdivision 4 of section 498, Hill's Code, available as a bar to plaintiff's suit, the answer must expressly "admit the charge," and they cannot be joined in an answer which denies all of such charges. — *Id.*
11. **DEMURRER — ADMISSIONS BY, NOT ENOUGH.** — For the purposes of the suit, all facts well pleaded are admitted by a demurrer; but such admission is not enough under this section. The admissions required must be by answer. — *Id.*

MARRIED WOMEN.

MARRIED WOMEN — LIABILITY OF, FOR FAMILY EXPENSES. — The wife is liable for goods for family use, although sold to the husband on his individual credit, under section 10 of the Session Laws of 1870, and the husband may change the form of indebtedness by giving his note for the account, without releasing her. Nor is the remedy against the wife extinguished by the assignment of such note. *Black v. Sippy*, 574.

MASTER AND SERVANT. See NEGLIGENCE.

MECHANICS' LIENS.

1. NOTICE—CLAIM OF LIEN FOR LABOR OR MATERIALS USED IN BUILDING. — It is not necessary that such claim should on its face state that the amount specified therein "is due over and above all just credits and offsets." (*Whittier v. Blakesley*, 13 Or. 546, approved and followed.) — *Kezartee v. Marks*, 529.
2. NOTICES OF CLAIM—WHEN SUFFICIENT. — A notice of a claim filed with the county clerk sufficiently gives the name of the owner of the building, which says that the materials were actually used in repairing the said dwelling-house and fence under the directions of W. F. O., who "was legally in possession of said premises under a contract of purchase and bond for a deed from S. M. & Co." So "building owned by W. F. O., deceased." "Further, furnished the materials upon said house at the request of W. F. O., the owner thereof." So when the notice recited that "the building was owned by W. F. O., and that the work was performed on said building at the request of W. F. O., the owner thereof." — *Id.*
3. NOTICE—NAME OF OWNER OF LAND. — To affect the land with the lien the name of the owner thereof must be given in the notice. This requirement is one of substance, and it cannot be dispensed with. — *Id.*
4. NOTICE—WHEN TITLE TO THE HOUSE OR STRUCTURE AND TITLE TO LAND IN DIFFERENT PERSONS. — When the title to the house or structure and title to the land are in different persons, and the notice specifies the name of the owner of the building or structure, but not the name of the owner of the land, the lien may attach to such building, but not to the land. — *Id.*
5. DESCRIPTION OF BUILDING OR IMPROVEMENT WHERE TITLE TO LAND IN ANOTHER. — When it affirmatively appears that the land where the building was erected did not belong to the person who caused such building or other improvement to be erected or repaired, the lien could only extend to the building or other improvement, and it would not be defeated by failing to describe the land, if such building or other improvement were sufficiently described for the purposes of identification. — *Id.*
6. DESCRIPTION OF BUILDING—WHEN SUFFICIENT. — If there be enough in the description of the locality and other peculiarities of the building to identify it—to point it out with reasonable certainty—with certainty to a common intent, the statutory requisition is complied with. — *Id.*
7. VERIFICATION OF CLAIMS—WHAT SUFFICIENT. — The statute requires "claims" to be verified, but prescribes no form of verification. *Held*, that a claim signed by the party and verified by his oath was sufficient. — *Id.*
8. LIEN ON DIFFERENT BUILDINGS OR STRUCTURES. — The liens under the statute are specific; they extend to the particular building, structure, or erection where the materials were used or labor performed. *Held*, therefore, that a party could not unite in the same claim items for materials used in building a fence, and also for materials used in building or repairing a house, and claim a lien on the fence and house for such materials. The fence and house are separate structures or erections, and the liens claimed must be for the materials used in each respectively. (*The Dalles L. & Manuf. Co. v. The Wasco Manuf. Co.* 3 Or. 527, approved and followed.) — *Id.*

MINES AND MINING.

LEASE—DUTY OF LESSEE. — Hodge, deceased, bought an interest in a lease of a mine for consideration expressed as follows: "\$750 cash, \$1,250 when 250 flasks of quicksilver produced, to each of the first parties." The lease provided that a certain amount of work should be done upon the mine during a certain time. Upon the following findings of the court below, "(1) The mine could not be operated at a profit, nor would, by any reasonable outlay, have produced 250 flasks of quicksilver." "(2) Two hundred and fifty flasks could have been produced had the mine been worked according to the terms of the lease within

MINES AND MINING (Continued).

the specified time." *Held*, (1) That it was inferable that H., in connection with the co-lessees, had undertaken to work the mine. (2) That if H. ceased work (in connection with the co-lessees) when the same, if worked in the ordinary mode, would have justified its developments, the deferred payment would have become matured. (3) That no valid judgment could be rendered against H. without a finding that H. failed to make reasonable efforts to operate the mine in view of the expense attending the same. (4) That the contract did not compel the working of the mine after it appeared that it was profitless. — *Ray v. Hodge*, 20.

MONEY HAD AND RECEIVED. See ASSUMPTIT.**MORTGAGES.**

1. **CHattel Mortgage must Describe with Reasonable Certainty.** — The description of property in a chattel mortgage must be reasonably certain, or the instrument will be inoperative and void. — *Gregory v. North Pacific L. Co.*, 447.
2. **Evidence.** — In proceedings to foreclose a chattel mortgage, oral proof may under proper circumstances be resorted to, to show what property was intended to be affected by the instrument. — *Id.*
3. **MORTGAGEE OF CHATTEL — CONVERSION MAY BE MAINTAINED BY, WHEN.** — It is not necessary that a chattel mortgage should have been foreclosed in order that the mortgagee may maintain an action for the conversion of the mortgaged property. Taking possession of the property by the mortgagee is sufficient to entitle him to recover against one having no title. — *Id.*
4. **PURCHASER AT FORECLOSURE SALE — EVIDENCE.** — The title of a purchaser at a foreclosure sale, who is a stranger to the decree, may be proven by the decree, the order confirming the sale, and the sheriff's deed. — *Moore v. Fraser*, 635.
5. **PLEADING — EVIDENCE — VARIANCE.** — An allegation of a purchaser at a foreclosure sale that the mortgage was given to the board of commissioners for the sale of school lands, etc., and thereafter foreclosed, is sustained by proving a decree in favor of the State of Oregon foreclosing the same mortgage, and such variance is not material. — *Id.*

See ACCOUNT, 2; JUDGMENTS AND DECREES, 1.

NEGLIGENCE.

1. **CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.** — The plaintiff must establish that he was injured by the negligence of defendant by testimony that does not tend to show contributory negligence upon his part; but beyond this, the burden of proof to establish contributory negligence is upon the defendant. — *Ford v. Umatilla County*, 813.
2. **SAME.** — Slight negligence not contributing to the injury does not defeat the plaintiff's right to recover. — *Id.*
3. **BURDEN OF PROOF — INTOXICATION.** — It does not change the burden of proof to the plaintiff if shown at the time of the accident he was intoxicated. — *Id.*
4. **SAME.** — It is not contributory negligence on the part of a traveler to assume that a bridge left open for travel is safe. — *Id.*
5. **RAILROAD COMPANY — RESPONSIBLE FOR ACTS OF ITS AGENTS, WHEN.** — One Blackburn was employed by F., an employee of the defendant, to go upon an engine attached to a passenger train "to learn the road" to "Summit station with the regular engineer." At the Summit, B. was to take charge of the engine and then "receive his running orders." Before arriving at the Summit, the train being stopped, the engine was detached by one of the employees of the company, and without the regular engineer, the engine was taken to the Summit by B., accompanied by the brakeman of the engine and other servants of the company. In

NEGLIGENCE (Continued).

bringing the engine back, it ran into the train and caused the accident complained of. The company denied that F. had any authority to employ any one, and claimed that B. had no connection with the company. The plaintiff was a passenger on the train and was injured. *Held*, (1) That whether B. was legally employed or not, yet so long as he was acting in subordination to the agents of the company, and in the capacity of an employee, and the company through its regular agents acquiesced in it, the company was responsible for his acts while so employed. (2) That the contract of a railroad company is to safely carry people to their several destinations, and that to this end the company is liable for all the acts and omissions of its agents connected with, or in the line of their duty. That a distinction is to be made between the "scope of employment" of servants of the company, in its dealing with passengers, and the common-law rule as to the same subject in dealings with strangers. That the "scope of employment" of the servant of a railroad company in such cases is as broad as the contract with, and obligation to the passenger entered into and assumed by the company, and is not regulated by the *specified* duties of his employment. That if the engine was moved by employees of the company, though without the consent of the engineer, an instruction that "the company is liable for any damages that might arise from such moving, *whether within the scope of their employment or not*," was not error, although it was inaccurate. — *Lakin v. Oregon Pacific R. R. Co.*, 220.

6. EVIDENCE. — A defect of a car or an engine cannot be shown in an action where the damage is alleged to have accrued through the negligence of employees, and the defects of the engine or machinery are not relied upon as a cause of action. But there is no error committed where a witness, detailing the circumstances of the accident, testifies that the engine was "leaking steam," the jury having been instructed by the court to disregard that part of his evidence. That the judgment would not be reversed because a witness in describing the accident testified to the mode of arrangement of the seats upon a car, where such evidence is merely incidental to his description. — *Id.*
7. CONTRIBUTORY NEGLIGENCE. — It is not contributory negligence on the part of the plaintiff where she — the cars being stopped for dinner — alighted from the train and subsequently resumed her place without direction so to do from the train men, and was then injured by a collision of the engine with the cars. — *Id.*

See COUNTRIES.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE PAPER — DEFENSE TO ACTIONS UPON. — The maker of a negotiable promissory note cannot defend against an action thereon in favor of an indorsee for value, on the ground that it was paid to a former indorsee, even though the transfer to the plaintiff in the action was made after the note was due. — *Adair v. Lenox*, 489.
2. SAME. — The rule that the transfer of an overdue note is made subject to all equities existing between the original parties does not extend to matters arising subsequent to the making of the note, and not affecting the contract, as originally made. — *Id.*
3. SAME. — A note once negotiable remains so until it is paid; the fact that it becomes overdue does not destroy its negotiability. — *Id.*
4. SAME. — It is the duty of the maker of such paper to see to it that the payee has it in possession, and to take it up when he pays it. — *Id.*
5. ATTORNEY'S FEE IN A PROMISSORY NOTE. — A provision in a promissory note for a stipulated attorney's fee of ten per cent upon the amount found due is of no legal effect, and the court will not enforce it. — *Kimball v. Moir*, 427.

NEGOTIABLE INSTRUMENTS (Continued).

6. **MODIFIED ALLOWANCE—OFFER TO PAY.**—The court will not modify the amount and then enforce it as modified, except so far as offered or admitted by the defendants. — *Id.*

NEW TRIAL.

1. **NEW TRIAL—REFUSAL TO GRANT, NOT REVIEWABLE.**—Under the Code of Criminal Procedure the refusal of the trial court to grant a new trial is not reviewable on appeal. — *State v. Roberts*, 187.
2. **MOTION FOR NEW TRIAL AND FOR JUDGMENT, NOTWITHSTANDING THE VERDICT—EFFECT OF.**—When the defendant filed a motion for a new trial and a motion for judgment *non obstante verdicto* at the same time, which latter motion is allowed by the court, and final judgment rendered for the defendant, which judgment was reversed on appeal; *held*, that the motion for a new trial had not thereby been disposed of; that it was not waived, and the trial court might in its discretion allow such motion after the reversal of the judgment given, notwithstanding the verdict. — *Fisk v. Henaris*, 89.

See **APPEAL**, 4.

NONSUIT.

1. **PRACTICE—NONSUIT—MOTION FOR.**—In the absence of a motion for a nonsuit by the defendant, or an instruction asked to that effect, the question as to the right of action by the plaintiff cannot be considered. — *Zigler v. McClellan*, 499.
2. **NONSUIT—WHEN GRANTED.**—The testimony submitted in this cause was not sufficient to have been submitted to the jury under the pleadings, and a nonsuit should have been granted. — *Buchanan v. Beck*, 563.

See **ESTATES OF DECEDENTS**, 2.

NOTICE. See **APPEAL**, 2; **ATTACHMENT**; **EVIDENCE**, 6; **FRAUDULENT CONVEYANCES**; **GARNISHMENT**; **MECHANICS' LIENS**.

OFFICE AND OFFICERS.

1. **OFFICER DE FACTO—ACTS OF.**—An office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. From its inherent nature, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time. — *Hamlin v. Kassaffer*, 456.
2. **POSSESSION OF OFFICE—WHAT CONSTITUTES.**—To constitute a person an officer *de facto* he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties, and when this is the fact, necessarily, there can be no other incumbent of the office. An officer *de facto* is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office. — *Id.*
3. **CLAIM OF RIGHT—COLOR OF.**—The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or without such color a performance of official duties, with the acquiescence of the public for such a length of time as to raise a presumption of colorable right. — *Id.*
4. **THE PUBLIC INTEREST.**—The interest of all persons having business with the office in controversy, imperatively demand that until the question of title can be decided, there should be some person recognized as in peaceable possession *de facto* of the office, and of the muniments necessary to discharge its duties. — *Id.*

OFFICE AND OFFICERS (Continued).

5. **TERM OF OFFICER—EXPIRATION OF—ACTS OF.**—Where one is holding over after the expiration of his term under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed.—*Id.*
6. **ATTORNEYS.**—The term of office of a district attorney begins on the first Monday of July following his election.—*State v. Colvig, 57.*
7. **SAME.**—Statutes prescribing a time within which an officer must qualify are directory in their nature.—*Id.*
8. **SAME.**—The person elected must qualify before taking the office.—*Id.*
9. **COMPLAINT UPON AN OFFICIAL UNDERTAKING.**—Under section 338 of the Code, before an action can be commenced upon an official bond or undertaking by any other person than the obligee named in the bond, leave of the court or judge thereof, where the action is triable, to commence the action, must be obtained, and a motion for a judgment of nonsuit should be allowed in the absence of such leave.—*Crook County v. Bushnell, 169.*
10. **SAME—FACTS SUFFICIENTLY STATED.**—Where the complaint shows that the defendant received money as treasurer, and failed to deliver the same to his successor in office, it is not necessary to allege that the money belonged to the county whose officer he was.—*Id.*

See JUDGMENTS AND DECREES, 3.

PARTNERSHIP.

1. **PARTNERSHIP CONSIDERED AND DEFINED.**—A partnership is a combination by two or more persons of capital, labor, or skill for the purpose of business, for their common benefit.—*Kelley v. Bourne, 476.*
2. **CASE IN JUDGMENT—PARTNERS INTER SE.**—The parties signing the agreement creating the "Grant's Pass Real Estate Association" became partners *inter se*, for all the purposes stated in the writing.—*Id.*
3. **PARTNERSHIP NAME.**—Every partnership should have its proper name or style. It may be whatever name the partnership chooses; and this name need not be prescribed in the articles, or determined upon by express agreement.—*Id.*
4. **DEED IN PARTNERSHIP NAME.**—A deed to a partnership by its firm name is not void.—*Id.*

See ACCOUNT, 1; EXECUTORS AND ADMINISTRATORS.

PLEADING AND PRACTICE.

1. **CODE—PLEADING UNDER—EQUITY PLEADING.**—The Code has abolished forms; it has not destroyed substance. Therefore, a plea of *bona fide* purchaser, and for value and without notice, must be as full under the Code as under the former system of equity pleading.—*Weber v. Rothchild, 385.*
2. **ABATEMENT—SUIT PENDING.**—The Code of this State allows the filing of an answer by way of plea in abatement, setting forth the pendency of another suit between the same parties, for the same cause of suit. It is immaterial that a third party is joined in the former suit.—*Crane v. Larsen, 345.*
3. **PLEADING—ANSWER.**—An answer must set forth the facts relied upon as a defense, and not the conclusions to be deduced therefrom.—*Id.*
4. **SAME—PRACTICE.**—Where the answer shows the pendency of another suit, but does not properly plead the necessary facts, it is error to allow the two causes to proceed independently of each other. The latter should be stayed until the determination of the former, or the two causes should have been consolidated and tried together.—*Id.*
5. **REPLY—WHAT CANNOT BE PLEADED IN.**—A plaintiff cannot plead in his reply matter which would be cause for an original action.—*Lillienthal v. Hotelling Co., 371.*

PLEADING AND PRACTICE (Continued).

6. **REPLY UNNECESSARY, WHEN.**—If the answer is wholly lacking in substance as to these essentials no reply is necessary. — *Weber v. Rothchild*, 385.
7. **PRACTICE—ANSWER TO ORIGINAL COMPLAINT—WHEN TREATED AS ANSWER TO AMENDED COMPLAINT.**—Upon the trial and after the evidence was all in the plaintiff amended her complaint touching causes of divorce so as to conform the pleadings to the facts proved, and the defendant E. S. R. did not amend his answer nor apply to the court for leave to do so, and his answer was treated as an answer to the amended complaint in the court below and in this court. *Held*, that E. S. R. not having been prejudiced in any manner could not be heard to complain in this court for the first time that he had not answered said amended complaint. — *Id.*
8. **ARGUMENT OF COUNSEL BEFORE JURY—NOT TO COMMENT ON FACTS EXCLUDED BY COURT.**—Upon the trial before the jury, it is improper for counsel to refer to or in any manner animadvert upon the plaintiff's refusal to consent that her physician be examined. It is a privilege which the law secures, and it is not to be questioned. — *Kelley v. Highfield*, 277.

SEE APPEAL; ASSUMPSIT; BILL OF EXCEPTIONS; CERTIORARI; CONVERSION; COSTS; CRIMINAL LAW; CROSS-BILLS; EQUITY; ESTATES OF DECEDENTS; FRANCHISES; FRAUDULENT CONVEYANCES; GARNISHMENT; MORTGAGES; NEW TRIAL; NONSUIT; REPLEVIN; TRESPASS; VENUE.

PLEDGE. See CORPORATIONS.

PRESCRIPTION. See WATERS, 2.

PRINCIPAL AND AGENT. See AGENCY.

PROCESS.

1. **SUMMONS, PROOF OF SERVICE OF.**—A return to a summons which fails to show that a copy of the complaint certified to by the justice of the peace, before whom the cause was pending, or by the plaintiff or his agent or attorney, is insufficient to sustain a judgment by default. — *Bejls v. Flint*, 158.
2. **PUBLICATION OF SUMMONS.**—Where the facts alleged in the affidavit show that the realty mortgaged was situated within the State, and that the suit to foreclose the lien upon it was brought by the parties to whom the mortgage was originally given against *those only* who gave it, and no third person being disclosed as a party by virtue of ownership of the *res*, subject to the mortgage, it necessarily appeared by such facts that the defendants Pike and wife still owned said realty when the foreclosure suit was instituted, and when the affidavit for the order was made. *Held*, that the facts alleged were sufficient to sustain the order for publication in a collateral proceeding. — *Pike v. Kennedy*, 420.
3. **DUE DILIGENCE—WHEN SHOWN.**—An affidavit "that said defendants reside at Walla Walla, W. T., which is their postoffice address, that personal service cannot be made upon said defendants for the reason that they have departed from the State, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla," is sufficient to establish, in a collateral proceeding, that defendants after due diligence cannot be found within the State, under the requirements of section 56 of Hill's Code. — *Id.*

SEE FORCIBLE ENTRY AND DETAINER.

PUBLIC POLICY. See CONTRACTS, 4, 5.

RAILROADS. See NEGLIGENCE.

REALTY. See COUNTIES; DEEDS; FIXTURES.

RECEIVERS.

1. **RECEIVER — COMPENSATION OF.** — The fact that a receiver may perform duties from which others may derive a benefit, or which he may not be required to perform, but may employ others to do, yet if he chooses to perform such services, and his authority to do it is derived from his office, it furnishes no basis for an extra charge, but is included in his compensation as receiver. — *Thompson v. Willamette S. M. L. Co.*, 604.
2. **WHEN SAME FIXED BY THE COURT.** — When such services are necessary and a part of the duties of his office, the fact that others may be benefited cannot effect his obligation to perform them, or give him any claim in his own right to any other pay than that fixed as the measure of his compensation for discharging all the duties of his office. — *Id.*
3. **EXTRA ALLOWANCE — WHEN MAY BE GRANTED.** — Where a receiver performs duties in addition to those ordinarily required, it may form the basis of an application for an extra allowance, which the court may grant. — *Id.*
4. **NOMINAL SERVICES OF.** — Where the facts showed that the plaintiff owned no stock in his individual right; that it was only in an official capacity that he was known to the corporation, or eligible to hold its offices; that the services rendered were performed in connection with his receivership for which he had been paid; that such services were merely nominal, the actual duties being, in the main, performed by the vice-president; that it was by virtue of such connection and title that the corporation gave him the presidency, and thereby the power to act for it; *held*, that the corporation's liability for such service was not to him in his own right, but to him in right of the estate to whom he owed, or such service belonged. — *Id.*
5. **BEN HOLLADAY INSTITUTED A SUIT** against Joseph Holladay to have certain deeds given by the former to the latter declared mortgages, which was done, and a decree rendered fixing the amount of indebtedness of the latter to the former at \$315,492.46. During the pendency of the suit, Thompson loaned Ben Holladay six thousand dollars, and took from Holladay a chattel mortgage on certain shares of stock. At the time of this transaction, Thompson was receiver in the suit of *Ben v. Jos. Holladay*, and as such receiver had the shares of stock in his own hands. Subsequent to the rendition of the final decree of the Supreme Court, and after the suit had been remanded to the Circuit Court, the parties to the suit entered into a stipulation whereby certain property was released from the lien of the decree and applied to the payment of the debts of Ben Holladay. Various deductions were made by creditors of Holladay, and his time of the redemption of said property extended from ninety days to three years. This suit was brought to foreclose the mortgage held by Thompson, and to restrain the receivers appointed in the Holladay suit, and who were still acting and in possession of various property, including the mortgaged stock, from selling said stock to satisfy any other claim against Holladay, until all other property covered by the decree had been sold. *Held*, that the parties to the suit of *Holladay v. Holladay* had the right to make any stipulation they might desire, releasing a part or the whole of the property affected by the decree. That such stipulation did not, by keeping the property in the hands of the receivers, operate to hinder or delay creditors, in violation of the statute in regard to fraudulent transfers. That the Circuit Court had the right to continue the receivers in office, and their right to the custody of the property and the policy of the act could not be inquired into in a collateral proceeding. That the court, in the case of *Holladay v. Holladay*, had the right, after having found the deeds in question to be mortgages, to direct that the property be sold to satisfy the indebtedness, but could not thereby change the time or terms of redemption as established by statute. That any

RECEIVERS (Continued).

person having a claim against Holladay is entitled, upon obtaining leave of the Circuit Court, to maintain suit against the receivers in their official capacity, in order to affect property under their control, and that the property in the hands of the receivers would not be affected by an action against Holladay alone. That Thompson could not lawfully, while acting as receiver, appointed by the court, take a mortgage from a party in the proceeding upon property in his custody as such receiver. That Thompson was entitled to a decree for the amount of his debt against Ben Holladay personally, and the receivers in their official capacity. (LORD, C. J., specially concurring.) Thompson could not, while receiver, become a mortgagee of property in his possession as such receiver. — *Thompson v. Holladay*, 84.

REFEREES.

STIPULATION. — It is immaterial that the appointment of a referee is unauthorized, where the parties have stipulated that the testimony taken by him may be used in the trial of the cause. — *Berry v. King*, 165.

REFORMATION OF CONTRACTS. See EQUITY.

REPLEVIN.

1. REPLEVIN — VERDICT — JUDGMENT. — In an action of replevin, a verdict is insufficient to authorize a judgment for either party which finds that the plaintiff is entitled to three fifths of each and every pile of lumber described in complaint, or the value thereof, and that the remainder belongs to plaintiffs. Replevin will not lie for an undivided part of a number of piles of lumber. (*Guille v. Wong Fook*, 13 Or. 577, approved and followed.) — *Phipps v. Taylor*, 484.
2. SAME. — When the plaintiff alleged that he was the owner and entitled to the possession of the property in controversy, which allegations were denied, a verdict is insufficient to authorize a judgment which is silent as to the ownership of the property. It leaves that issue undetermined. — *Id.*
3. ALTERNATIVE JUDGMENT. — In an action of replevin, a plaintiff is only entitled to an alternative judgment upon a verdict in his favor, if the property has not been delivered to him. If, during the progress of the action the property has been delivered to him, a judgment in his favor settles his right to it, and it then being in his possession, the alternative judgment is unauthorized. (Hill's Code, § 214.) — *Id.*
4. SAME. — In said action, the plaintiff may recover distinct parcels, or a part of the separate articles sned for, and the defendant prevail as to the others; but he cannot recover undivided portions of entire and distinct lots. — *Id.*

RES ADJUDICATA.

FORMER APPEAL — LAW OF THE CASE. — The ruling of this court on the former appeal has become the law of the case. — *Budd v. Multnomah St. Ry. Co.*, 404.

REVIEW. See CERTIORARI.

ROADS.

1. ROADS, PRIVATE. — A petitioner having pursued the mode pointed out by the Code Act of 1876 (Sess. Laws), becomes entitled to the road as a matter of right. — *Douglas County v. Clark*, 3.
2. SAME. — A bond exacted by the County Court to indemnify the county against the expenses of location, and damages assessed, is void as being contrary to public policy. — *Id.*

ROADS (Continued).

3. **SAME.**—The County Court has no authority to take such a bond under section 1, Misc. Laws. That section refers only to corporate affairs. — *Id.*
4. **SAME.**—The power of locating a private road is entirely of a public nature. — *Id.*
5. **APPEAL FROM ASSESSMENT OF DAMAGES—WHEN IT LIES.**—Under section 4069 of Hill's Code, an appeal lies to the Circuit Court from the assessment of damages, within twenty days after the report is adopted by the County Court. — *Hammer v. Polk County*, 578.
6. **ORDER OF COUNTY COURT—EFFECT THEREOF.**—The legal effect of the order of the County Court adopting the report, but refusing to establish the road as a public highway, unless the petitioners first paid the damages, was to declare in effect that such road was not of sufficient public utility to require the county to pay such damages. — *Id.*
7. **REASONABLE TIME—COMPLIANCE BY PETITIONERS.**—After the making of such order the petitioners had a reasonable time within which to comply, but the appellant's right of appeal was in no way dependent thereon. — *Id.*

SALES.

1. **POSSESSION—DELIVERY OF—WHAT IS.**—The agent of appellants bought wheat in a warehouse and left orders for its delivery on board the cars, which was done, and the cars placed on a side track awaiting transportation. In this condition the defendants, being a sheriff and his deputy, seized the wheat by virtue of a writ of replevin sued out by B. & B., who asserted title thereto. *Held*, the delivery was complete. — *Allen v. Agee*, 551.
2. **VENDOR—TITLE TO PROPERTY—HOW DIVESTED.**—It is the buyer's own fault if he is so negligent as not to ascertain the right of his vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his right or title to his property by his own act. — *Velsian v. Lewis*, 539.
3. **POSSESSION, UNAUTHORIZED—WHAT IS—CONVERSION OF CHATTELS.**—A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which, in the absence of evil intent in the purchaser, cannot make rightful or lawful. — *Id.*

STATUTE OF FRAUDS.

1. **STATUTES OF FRAUD—CONTRACTS, WRITTEN—VERBAL MODIFICATIONS OF.**—The statutes of this State make a contract not to be performed within one year from the making thereof void, unless the same is in writing. *Held*, in an action where a written contract had been modified by a verbal agreement, which verbal agreement was not to be performed within one year, that oral evidence was admissible, in an action thereon, in order to give an understanding of the surrounding circumstances. — *Keller v. Bley*, 429.
2. **STATUTE OF FRAUDS—PAROL PROMISE UNDER.**—A parol promise by L. to appellants that if they would forbear to sue H. for a debt, he, L., would within a reasonable time pay, or cause said debt to be paid to appellants, in consideration whereof the appellants refrained from suit, *held*, to be void under the Statute of Frauds. — *Gump v. Halberstadt*, 356.

STOCK. See CORPORATIONS.

SUBSCRIPTIONS. See CORPORATIONS.

SUMMONS. See PROCESS.

SURETYSHIP.

SURETIES — PAROL EVIDENCE.—In an action upon a written contract, it may be alleged and proven, when necessary, that one or more of such parties signed said contract as surety. — *Thompson v. Coffman*, 631.

TAXATION.

1. **TAXABLE PROPERTY — INDEBTEDNESS — HOW DEDUCTED FROM.**—In order to be allowed a deduction for indebtedness, claimed before the board of equalization, the statement of the particular indebtedness must be made and sworn to, in accordance with section 2752 of Hill's Code. — *Oregon & Washington Sav. Bank v. Callin*, 842.
2. **PARTY — WHEN COUNTY MUST BE.**—In a proceeding to correct an erroneous assessment, the county must be made a party defendant. — *Id.*

TIDE-LANDS.

1. **TIDE-LANDS, WHAT ARE.**—An isolated sand bank alternately covered and exposed by tides, situated one mile from the Oregon shore in the Columbia River, and entirely disconnected from the main lands, is not tide-land within the meaning of that term. — *Elliott v. Stewart*, 259.
2. **SAME.**—The term "tide-lands" apply to those lands adjoining main land, and periodically covered and uncovered by the rising and falling tides. — *Id.*

TORTS. See DAMAGES.

TOWN PLAT.

TOWN PLAT.—One McClure, in 1847, laid out the town site of Astoria, establishing therein a street known as "Hamilton Street." Subsequently, Cyrus Olney, having bought the land, prepared and had recorded a second map of said town known as "the plat or map of McClure's Astoria, as extended by Cyrus Olney." By said map, Hamilton Street was abolished and laid out as lots. Prior to the making of the latter map, Olney sold to one Monteith certain blocks described and numbered in the McClure map, which adjoined the said Hamilton Street. Upon a suit brought to enjoin the erection of buildings upon Hamilton Street by grantees of Olney; *held*, (1) That the effect of the map or plat must be determined from the map itself, and oral testimony cannot be introduced to show any intent on the part of Olney when he made it. (2) That whether a change in the original plat of the town of Astoria, or simply an extension of the town was made by Olney's map, must be determined by an examination of the map, not from the name given it. (3) That at the time the plat was made the title to the land lying between high and low-water mark was in the State, and no one had any right in it to convey, though the riparian owner might, so far as he himself was concerned, dedicate it as a street, and so conduct himself as to be estopped from denying the dedication. (4) That the act of the legislature granting the fee of the streets in Astoria to the city only contemplated such streets as were in existence, not such as had been vacated. — *Hobson v. Monteith*, 251.

TRESPASS.

1. **PLEADING — EVIDENCE.**—In an action to recover damages for a trespass alleged to have been committed on the south half of a certain land claim, evidence of the wrong must be confined to the particular tract of land described in the complaint. — *Jennings v. Meldrum*, 629.
2. **EVIDENCE — TITLE BY ADVERSE POSSESSION.**—In such case, it is not competent to prove title to another parcel of land outside of the lines of the particular donation claim, by proving an adverse possession for more than ten years next before the commencement of the suit. — *Id.*

TRESPASS (Continued).

3. EVIDENCE — PLEADING. — Where the plaintiff by her pleading limited her claim to the south half of the donation land claim of herself and husband, it is not competent to prove a trespass committed on the Rinearson donation claim, though the plaintiff may have acquired a title to the particular place where the trespass was committed by adverse possession. — *Id.*

TROVER. See CONVERSION.

TRUSTS.

1. TRUST, RESULTING — EVIDENCE TO ESTABLISH. — The court will not declare a trust where one of the parties to the transaction is dead, and the evidence of the other — *the only witness* — is uncertain and unsatisfactory, and a long time is suffered to elapse before the commencement of the suit. — *Clark v. Pratt*, 304.
2. TRUST, UNCERTAINTY OF BENEFICIARIES IN CASE OF CHARITABLE. — In case of a public charitable trust, it is not necessary to its validity that the beneficiaries should be known. It is the use to which the property is to be applied and not the particular persons to be benefited which the law regards. — *Raley v. Umatilla County*, 172.
3. PUBLIC CHARITABLE TRUSTS. — Such trusts are generally favored and liberally construed by the courts. — *Id.*
See ACCOUNT, 2.

UNDERTAKINGS. See CONTEMPT; COSTS.

VENUE.

COURTS. — During a regular term of the Circuit Court of the State of Oregon for Baker County, the district judge, Ison, presiding, and conducting a trial with a jury drawn from the regular panel, a jury was drawn by Judge Bird of the Seventh Judicial District, and a trial of this cause had at a place other than the court-house. Defendant appeared, and without objecting to the jurisdiction of the court asked for a continuance, which was granted; upon re-appearance the defendant objected to the further proceeding. A jury was impaneled and a trial had. *Held*, (1) That there was no authority for holding more than one Circuit Court at the same time in the same county. (2) That the judgment should be reversed, as it appears that the trial was not had at the place designated by law, and it does not appear that the place where it was had, had been properly selected or designated. And appellant had no opportunity for defense. *Baisley v. Baisley*, 183.

VERDICT.

1. CASE IN JUDGMENT. — Where the entire tenor of the complaint showed the object of the action was to recover damages for the wrongful deprivation of the use of land, the court will give it that construction after verdict, although the gains from the use of the lands are called *profits*. — *Wilder v. Oregon R. & N. Co.*, 153.
2. PRESUMPTIONS AFTER VERDICT. — If the complaint contains any allegations under which any evidence might have been introduced which would have authorized the verdict given, this court is bound to presume that such evidence was actually introduced, and that the verdict was based thereon. — *Id.*

See APPEAL; JURY AND JURORS; JUSTICES' COURTS.

WAREHOUSEMEN.

1. **BAILEMENT—RIGHT OF DEPOSITOR.**—The deposit of wheat in a warehouse, which has been mingled with the wheat of other persons in a common mass, is a bailment, and the depositor does not lose his right thereby to reclaim it. — *McBee v. Caesar*, 62.
2. **DAMAGES FOR CONVERSION.**—Where a warehouseman ships wheat to a third party, without the consent of the depositor, such depositor is not estopped from claiming damages for its conversion, unless by acquiescing in the acts of the warehouseman, he has misled such third party. — *Id.*
3. **WAREHOUSEMAN—DEMAND—WHEN NECESSARY.**—Where wheat was purchased from one without title, and the possession thereof is given the purchaser from a warehouseman, on the order of the seller and without the consent of the depositor of such wheat, *held*, that no previous demand is necessary to maintain an action of trover for its wrongful conversion. — *Velian v. Lewis*, 539.

WATERS.

1. **APPROPRIATION OF WATER—EVIDENCE EXAMINED.**—*Neil v. Tolman*, 12 Or. 289, involving the same questions on substantially the same evidence, approved and followed. — *Tolman v. Casey*, 83.
2. **PRESCRIPTIVE RIGHT—MAY SUBORDINATE OTHER RIGHTS.**—When the plaintiff had a prescriptive right to the use of certain quantities of water between fixed dates, upon the public lands of the United States, one who succeeds to the title of the United States takes it subject to the rights of such appropriator, and cannot complain. — *Id.*
3. **POWER OF COURT UNDER FORMER DECREE.**—A previous decree had determined and settled the rights of certain of the parties in the water in controversy. *Held*, that the court below had the power, and upon proper application made for that purpose, it would fully execute such decree, and if necessary, prescribe the method of measuring the water. — *Id.*
4. **WATER-COURSE—CHANNELS.**—An instruction that if the jury found that the waters of Mill Creek flowed through the same slough, ditch, or channel on the lands of plaintiff during the two years preceding the commencement of the action that they had been running in for twenty years before that time, then such slough, ditch, or channel was for the purposes of the action the channel of Mill Creek, and its banks the banks of Mill Creek, within the meaning of a complaint, alleging that the defendant had overflowed said Mill Creek to the damage of plaintiff's premises, coupled with an instruction that if one diverts the waters of a stream by artificial means, he is bound to take care of the same until it returns to its natural bed. *Held*, to be correct. — *Tucker v. Salem Flouring Mills Co.*, 551.
5. **PLEADINGS—PROOF—VARIANCE.**—Evidence that the appellants wrongfully caused the waters of Santiam River to flow into an artificial channel, constructed twenty years before the alleged wrongful act, and which had become the channel of "Mill Creek," is sufficient to sustain a charge in the complaint of having caused the waters of the Santiam River to flow "into Mill Creek," thereby damaging plaintiff, etc. — *Id.*

See INJUNCTIONS.

WAYS. See ROADS.

WILLS. See EXECUTORS AND ADMINISTRATORS.

WITNESSES.

1. **PROFESSIONAL WITNESS—DISCLOSURE OF FACTS LEARNED PROFESSIONALLY.**—A physician cannot without the consent of his patient be questioned concerning any facts learned by him in the course of his professional employment.—*Kelley v. Highfield*, 277.
2. **EVIDENCE—READING A MEMORANDUM OF FACTS BY WITNESS BEFORE GOING ON THE WITNESS STAND.**—Evidence given by a witness is not incompetent, for the reason that before going on the witness stand he refreshed his memory by reading a narrative of the facts written by another. Such an objection goes to the weight of the evidence, the credit which it ought to receive, and not to its competency. Here the witness had some knowledge of the facts—how much does not appear—before looking at the memorandum.—*State v. Moran*, 262.
3. **ASSUMPSIT—EVIDENCE, HEARSAY.**—In an action for the value of some tools sold, a list of the tools made by a person whose only knowledge of its correctness was hearsay, was offered to show their value. *Held*, the court properly refused the testimony.—*Keller v. Bley*, 429.

See EVIDENCE.

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